Supreme Court, U.S.
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No. 07-

IN THE
Supreme Court of the United States

HOZAY ROYAL,

Petitioner,

v.

ROBERT DURISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prisoner who commences a Section 1983 action after he has been released, when habeas corpus relief is no longer available, must satisfy the favorable termination rule of *Heck* v. *Humphrey*, 512 U.S. 477 (1994).

PARTIES TO THE PROCEEDING BELOW

The parties in the court of appeals were Petitioner, Respondent, and defendant-appellee Vivian Miller. Ms. Miller was dismissed from the case by mutual consent of the parties after briefing but before oral argument in the court of appeals.

Petitioner is also known as "Carlos Johnson."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit. The Third Circuit held that a Section 1983 plaintiff who has been released, and thus is unable to challenge the length of his confinement through a habeas corpus petition, must nevertheless satisfy the "favorable termination" requirement stated set out in *Heck* v. *Humphrey*, 512 U.S. 477 (1994). The court of appeals' decision implicates an acknowledged split in the circuits. The decision is contrary to the opinions expressed in concurring and dissenting opinions of five Justices of this Court in *Spencer* v. *Kemna*, 523 U.S. 1 (1998), and conflicts with the decisions of five other courts of appeals. These courts hold that *Heck* does not bar an action by a Section 1983 plaintiff who cannot pursue a habeas corpus remedy. Three additional circuits share the view of the Third Circuit that suits by such plaintiffs are barred by *Heck*. Certiorari should be granted to resolve a deep and abiding conflict among the circuits on an important question of federal law.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-6a, and the opinion and judgment of the district court, App., *infra*, 7a-17a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2007. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Section one of the Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1.

Section 1983 of Title 42 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress * * * .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This case presents an important and recurring question on which the federal courts of appeals are divided: Whether a prisoner who brings a Section 1983 claim must satisfy the "favorable termination" rule of *Heck* v. *Humphrey*, 512 U.S. 477 (1994), even when he is foreclosed from obtaining a favorable termination through habeas corpus proceedings.

1. The Favorable Termination Rule of *Heck* v. *Humphrey*. In a series of cases beginning in the early 1970s, this Court has examined the "intersection" of 42 U.S.C. § 1983 and the habeas corpus statute. The Court has noted that these two provisions both provide "access to a federal forum for claims of unconstitutional treatment at the hands of state officials, but they differ in their scope and operation." *Heck*, 512 U.S. at 480. The habeas corpus statute provides a cause of action for a prisoner who alleges that he is being held "pursuant to the judgment of a State court" "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Section 1983 provides a remedy for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. While a claim that a prisoner is being held in violation of the Constitution or laws of the United States could fall within the broadly-written text of § 1983, the Court's cases have limited the § 1983 remedy to avoid such an overlap.

The Court's examination of the potential conflict between § 1983 and the habeas statute began with *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). In *Preiser*, state prisoners brought actions under

Section 1983 challenging their loss of good-time credits in prison disciplinary proceedings. *Id.* at 477-81. The prisoners sought restoration of their good-time credits and immediate release from custody. *Id.* The Court noted that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody," and that "the traditional function of the writ is to secure release from illegal custody." *Id.* at 484. Accordingly, the Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Id.* at 500.

In *Heck* v. *Humphrey*, the Court addressed a complementary question: whether prisoners who do *not* seek "immediate or speedier release," may pursue relief under Section 1983 if they seek instead monetary damages for a claim that "call[s] into question the lawfulness of conviction or confinement." 512 U.S. at 481, 483. The Court analogized such a claim to the tort of malicious prosecution, noting that "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Id.* at 484. The Court held that a similar "favorable termination" requirement was appropriate for Section 1983 damages suits challenging "an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid." *Id.* at 486. In those circumstances, "a § 1983 plaintiff must prove that

the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87.

Although the plaintiff in *Heck* was "in custody" and could have availed himself of the habeas corpus statute, footnote 10 of the Court's opinion stated, "We think the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 490 n.10.

In a concurring opinion joined by three other Justices, Justice Souter took a different view. Justice Souter noted that "a sensible way to read the opinion" in *Heck* is that "prison *inmates* seeking § 1983 damages in federal court for unconstitutional conviction or confinement must satisfy a requirement analogous to the malicious-prosecution tort's favorable-termination requirement." 512 U.S. at 500 (Souter, J., concurring) (emphasis added). The concurrence asserted that "the alternative would needlessly place at risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not 'in custody' for habeas purposes." *Id.* "If these individuals (people who were merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences), like state prisoners, were required to show the prior invalidation of their convictions or sentences in order

to obtain § 1983 damages for unconstitutional conviction or imprisonment, the result would be to deny any federal forum for claiming a deprivation of federal right to those who cannot first obtain a favorable state ruling." *Id.* The concurring Justices concluded: "That would be an untoward result." *Id.*

Four years after *Heck*, the Court addressed a different but related issue in *Spencer* v. *Kemna*, 523 U.S. 1 (1998). In *Spencer*, the Court addressed whether a prisoner challenging the revocation of his parole could maintain his habeas corpus petition even after his sentence expired. The Court held that in such a case, the habeas corpus petition is moot unless the petitioner can show some "collateral consequence" of the conviction. *Id.* at 8. The Court concluded that the petitioner would not suffer collateral consequences from his parole revocation and that his habeas corpus petition was therefore moot. *Id.* at 124-17. The Court rejected the argument that the petitioner would suffer collateral consequences because *Heck*'s favorable termination requirement would bar a future action under Section 1983 if his habeas corpus action were not permitted to proceed. *Id.* at 17.

In accord with that holding, five Justices, in concurring and dissenting opinions, expressed the view that *Heck* would *not* bar a future Section 1983 action by a released prisoner. Justice Souter's concurrence, joined by Justices O'Connor, Ginsburg, and Breyer, noted that "*Heck* did not hold that a released prisoner in Spencer's circumstances is out of court on a § 1983 claim." *Id.* at 19 (Souter, J., concurring). Citing his *Heck* concurrence, Justice Souter wrote that "it would be unsound to read

either *Heck* or the habeas statute as requiring any such result." *Id.* at 19. The concurrence stated that "any application of the favorable-termination requirement to § 1983 suits brought by plaintiffs not in custody would produce a patent anomaly: a given claim for relief from unconstitutional injury would be placed beyond the scope of § 1983 if brought by a convict free of custody." *Id.* at 20. Justice Souter concluded that the "better view" is that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id.* at 21.

Justice Ginsburg, who had not joined Justice Souter's concurrence in *Heck*, concurred separately, stating, "I have come to agree with JUSTICE SOUTER's reasoning: Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentenced have been fully served, for example) fit within § 1983's 'broad reach.'" *Id.*

Justice Stevens, while dissenting from the majority opinion in *Spencer*, agreed with Justices Souter and Ginsburg's concurring opinions, stating that "[g]iven the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as JUSTICE SOUTER explains, that he may bring an action under § 1983." *Id.* at 25 n.8.

Five Justices of this Court thus have expressed the view that *Heck*'s favorable termination rule does *not* bar a § 1983 action brought by

individuals for whom no habeas corpus remedy is available.

2. The Facts of This Case. Petitioner Hozay Royal brought this Section 1983 action against officials in the Philadelphia Prison System to recover money damages for 180 days that he spent in custody beyond the seven-year maximum allowed under Pennsylvania law for his shoplifting conviction.

Mr. Royal was convicted of shoplifting in 1984 and sentenced in 1985. App., *infra*, 8a. Before his sentence began, Mr. Royal spent a total of 180 days in custody (in two separate periods) on account of the shoplifting crime. *Id.* Mr. Royal received a sentence with a maximum of four years. *Id.* The 180 days that Mr. Royal spent in custody prior to sentencing were not credited toward his sentence, and Mr. Royal served the entire four years. *Id.*[1] Mr. Royal was released on probation. *Id.*

Under Pennsylvania law, any time that a criminal defendant spends in custody as a result of a particular charge is credited toward the maximum sentence allowed by statute for that charge. 42 Pa. Cons. Stat. § 9760 ("Credit against the maximum term and any minimum term shall be given to the

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[1] During his incarceration, Mr. Royal was convicted on a separate shoplifting charge, the sentence for which was added to the sentence he was already serving. When Mr. Royal's first sentence expired, he remained in custody on the subsequent sentence. The district court's opinion mistakenly stated that Mr. Royal was released immediately after his first sentence ended. App., *infra*, 8a.

defendant for all time spent in custody under a prior sentence if he is later reprosecuted and resentenced for the same offense or for another offense based on the same act or acts."). This is true so long as the time has not been credited against another sentence. *See Commonwealth* v. *Bowser*, 783 A.2d 348, 350 (Pa. Super. Ct. 2001) (declining to award "duplicate credit"). Mr. Royal did not receive any credit for the 180 days he spent in custody before he began serving the original sentence in 1985. Thus, the time remained available to be credited against the maximum term of imprisonment allowed for shoplifting for any future sentence based on the same charge. *See Commonwealth* v. *Williams*, 662 A.2d 658, 659 (Pa. Super. Ct. 1995) (awarding credit on probation revocation sentence to avoid exceeding the statutory maximum). The maximum sentence under Pennsylvania law for shoplifting (or "retail theft") is seven years. 18 Pa. Cons. Stat. §§ 1103(3), 3929(b)(iv).

In 1999, Mr. Royal was found to have violated the terms of his probation stemming from the same 1984 shoplifting conviction. App., *infra*, 8a. For violating his probation, Mr. Royal received a sentence with a maximum of three years' incarceration, but again was not credited with the 180 days he served in 1984 and 1985. *Id.* at 8a-9a.[2] Mr. Royal served the probation violation sentence in the Philadelphia Prison System, where Respondent is the official responsible for calculating inmate

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[2] Mr. Royal was credited with the time he spent in custody between his 1999 arrest and 1999 sentencing. App., *infra*, 9a.

sentences. During the three years that Mr. Royal was incarcerated on the probation violation, he made six separate requests that Respondent correct the calculation of his sentence to account for the 180 days that Mr. Royal was detained before he began serving his original sentence on the 1984 conviction.

Mr. Royal informed Respondent that unless he was credited with the time he was held prior to his original sentence, he would be incarcerated for 180 days beyond the seven-year maximum allowed by Pennsylvania law for shoplifting: Mr. Royal was detained 180 days before his original sentence; he served four full years on that sentence; and he was being held on an additional three-year sentence. Together, those periods would total seven years and 180 days.

Respondent never came to any conclusion as to whether Mr. Royal was entitled to the credit. Instead, Respondent's replies to Mr. Royal's requests indicated that Respondent did not believe he could confirm the periods of incarceration from 1984 and 1985. Those replies were contained in two hand-written notes. The first note was written on Mr. Royal's second request for credit, and said: "This is a state parole issue & I doubt we can confirm any time from that period that wasn't applied to Mr. Royal's state sentence when he was sent to the [state correctional institution]." C.A. App. 51a. Respondent's second hand-written response similarly expressed doubt that Respondent could confirm Mr. Royal's time, stating: "I have no microfilm or automated records for the period you are referring to, and the court database is no help." C.A. App. 47a-48a. In addition Respondent stated (contrary to

Pennsylvania law) that because he was serving a probation violation sentence, Mr. Royal would not be entitled to credit for time served prior to his original sentence. *Id.*[3]

Mr. Royal then included in his subsequent requests a full explanation of the two periods that he was incarcerated in 1984 and 1985 along with documentation of those periods. C.A. App. 23a-25a; 33a-38a; 45a-46a. The documents Mr. Royal provided showed the date he was initially arrested, the date he was discharged on bail, the date he was arrested for the second time, that his second arrest included a "fugitive from justice" charge that precluded bail, the date of his conviction, the date of his sentencing, and the "Sentence Status Summary" from 1985, showing that he had not received any credit for time served. *Id.*

Respondent never responded to Mr. Royal's further requests or to the documentation that Mr.

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[3] Pennsylvania's sentencing law provides that a person convicted of a crime be given credit against the maximum term of imprisonment for "all time spent in custody under a prior sentence if he is later reprosecuted and resentenced for the same offense or for another offense based on the same act or acts." 42 Pa. Cons. Stat. § 9760. Pennsylvania state court decisions confirm that time spent in custody on an original sentence is credited toward the maximum sentence for a probation violation sentence stemming from the same crime. *McSpadden* v. *Dep't of Corr.*, 870 A.2d 975, 977 (Pa. Commw. Ct. 2005); *Commonwealth* v. *Bowser*, 783 A.2d 348, 350 (Pa. Super. Ct. 2001); *Commonwealth* v. *Williams*, 662 A.2d 658, 659 (Pa. Super. Ct. 1995).

Royal provided.[4] Mr. Royal served the full three years on the probation violation sentence. Combined with his original sentence and the time he was detained prior to that sentence, Mr. Royal served seven years and 180 days for the 1984 shoplifting conviction.

Mr. Royal's State and Federal Petitions for Post-Conviction Relief. In 2000, while incarcerated on the probation violation sentence, Mr. Royal brought a petition under Pennsylvania's Post-Conviction Relief Act ("PCRA"), seeking credit for the time he served in 1984 and 1985. App., *infra*, 9a. Mr. Royal's PCRA petition remained pending during his remaining incarceration for the probation violation. Mr. Royal was released on February 16, 2002, and on October 30, 2002, his PCRA petition was denied as moot. *Id.* at 10a.

In December 2000, Mr. Royal brought a habeas corpus petition, which he later attempted to amend to raise his time credit issues. The court denied Mr. Royal's petition, and denied his motion to amend, stating that the time-credit claim either was defaulted or was not yet exhausted due to the pending PCRA petition. *Id.*

The District Court's Order. Proceeding pro se, Mr. Royal filed this action for money damages under 42 U.S.C. § 1983 against Respondent, alleging violations of his Eighth Amendment right to be free from cruel and unusual punishment, and his Fifth

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[4] Respondent did correct a three-day error regarding credit for the time Mr. Royal spent in custody in 1999 prior to the 1999 sentence. App., *infra*, 9a.

and Fourteenth Amendment right to procedural due process.[5]

The district court granted summary judgment to Respondent. App., *infra*, 7a. On Mr. Royal's Eighth Amendment claim, the court acknowledged that the Eighth Amendment is violated based on an incorrectly calculated sentence if the plaintiff shows 1) "that a prison official had knowledge of the contention that the sentence the prisoner is serving has been incorrectly calculated and thus of the risk that unwarranted punishment was being, or would be, inflicted"; 2) "that the official either failed to act or took only ineffectual action under the circumstances indicating that his or her response to the problem was a product of deliberate indifference to the prisoners plight"; and 3) "a causal connection between the official's response to the problem and the infliction of the unjustified detention." *Id.* at 11a, citing *Sample* v. *Diecks*, 885 F.2d 1099, 1110 (3d Cir. 1989).

The court assumed that Mr. Royal's pre-commitment time was improperly credited and that his term of imprisonment exceeded the maximum allowable under Pennsylvania law, but held that Royal "failed to establish that the excessive detention was the result of deliberate indifference by prison officials." *Id.* at 11a.

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[5] Mr. Royal also sued Vivian Miller, the clerk of the courts for the Court of Common Pleas of Philadelphia County and the Philadelphia Municipal Court. By agreement of the parties, Ms. Miller was dismissed from the case after briefing but before oral argument in the court of appeals.

With regard to Mr. Royal's Fifth and Fourteenth Amendment claim, the district court noted the Third Circuit's holding that a prisoner must be given "meaningful and expeditious consideration" of a claim that his term of imprisonment has been miscalculated. *Id.* at 15a, citing *Sample*, 885 F.2d at 1115. The district court held that Royal "failed to point to evidence from which a factfinder would find that his claim was not meaningfully and expeditiously considered by defendants." *Id.* The district court thus granted summary judgment to Respondent on Royal's due process claim.

The Court of Appeals' Opinion. Mr. Royal timely appealed from the district court's judgment. The court of appeals appointed counsel and ordered the parties to address the additional question of "whether *Heck* v. *Humphrey*, 512 U.S. 477 (1994), bars the current action under 42 U.S.C. Section 1983."

In addition to his arguments that the district court was incorrect to grant summary judgment, Petitioner argued that *Heck* did not apply because success on his claim would not "render a conviction or sentence invalid" and would "not demonstrate the invalidity of any outstanding criminal judgment against" him. *Heck*, 512 U.S. at 486-87. Petitioner also argued that, in accordance with the concurring and dissenting opinions of five Justices of this Court in *Spencer* v. *Kemna*, *Heck* does not bar a Section 1983 action brought by an individual who cannot obtain a favorable termination because habeas corpus is no longer available. Petitioner acknowledged that the Third Circuit had already

rejected the latter argument in *Williams* v. *Consovoy*, 453 F.3d 173 (3d Cir. 2006), but raised the issue to preserve it for further review.

After briefing and oral argument, the court of appeals affirmed the judgment of the district court on the alternative ground that Royal's claims are barred by *Heck*. App., *infra*, 6a. The court rejected Petitioner's argument that success on his claims would not invalidate his sentence, stating, "[w]ere we to hold that the Commonwealth of Pennsylvania did, in fact, incarcerate Royal beyond the statutory maximum, we would necessarily be holding that the 'confinement or its duration' was invalid in violation of the favorable termination requirement announced in *Heck*." *Id.* at 4a.

The court of appeals also rejected Petitioner's argument that *Heck* should not apply because habeas corpus was no longer available to him. *Id.* at 5a-6a. The court acknowledged that "several Courts of Appeals have concluded that *Heck*'s favorable termination requirement does not apply to a prisoner no longer in custody." App., *infra*, 5a-6a & n.1 (citing *Huang* v. *Johnson*, 251 F.3d 65, 74 (2d Cir. 2001); *Shamaeizadeh* v. *Cunigan*, 182 F.3d 391, 396 (6th Cir. 1999); *DeWalt* v. *Carter*, 224 F.3d 607, 617 (7th Cir. 2000). The court noted, however, that the Third Circuit has "expressly declined to adopt this rule." App., *infra*, 5a-6a, citing *Williams*, 453 F.3d at 177-78.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Opinion Conflicts With Decisions Of Five Other Circuits.

The court of appeals' opinion in this case recognizes the split among the circuits on the question of whether a prisoner no longer in custody must satisfy the favorable termination rule of *Heck* v. *Humphrey* in order to bring a § 1983 suit challenging the duration of his incarceration. App., *infra*, 6a. Other courts and scholarly commentary have also acknowledged the split. *E.g.*, *Powers* v. *Hamilton County Pub. Defender Comm'n*, 501 F.3d 592, 602 (6th Cir. 2007) ("[O]ur sister circuits are divided on the question."); *Dible* v. *Scholl*, 410 F. Supp. 2d 807, 820 (N.D. Iowa 2006) (noting that the courts have "split into two camps"); Note: *Defining the Reach of* Heck *v.* Humphrey*: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?* 121 Harv. L. Rev. 868, 869 (2008) (noting that "the lower courts are divided" on the question); Bruce Ellis Fein, Heck *v.* Humphrey *After* Spencer *v.* Kemna, 28 New Eng. J. on Crim. & Civ. Confinement 1, 25 (2002) (noting the circuit split on "an important question[] of federal law" that "demand[s] resolution").

The circuit split is even more pronounced than would appear from the Third Circuit's opinion. In addition to the three circuits the court of appeals cited, two additional circuits have held that a Section 1983 action may proceed without satisfying a favorable termination requirement when habeas corpus is not available to the plaintiff. On the other hand, three circuits have agreed with the Third Circuit, and have held that *Heck* bars a Section 1983

action even if the plaintiff cannot obtain a favorable termination through habeas corpus.

The circuit split warrants this Court's review. The conflict in authority makes the ability of prisoners to obtain relief for unconstitutional treatment at the hands of state officials depend on geographical happenstance. An individual like Mr. Royal—attempting to obtain relief for half a year of unconstitutional imprisonment—could proceed on his claim in the five circuits that do not view *Heck* as a bar when habeas is not available, but cannot proceed in the four circuits that hold the opposite view. This Court has acknowledged that "[m]embers of the Court have expressed the view that unavailability of habeas for other reasons may * * * dispense with the *Heck* requirement." *Muhammad* v. *Close*, 540 U.S. 749, 752 n.2 (2004) (per curiam). While the Court stated that case was "no occasion to settle the issue," the occasion is now here. *Id.*

A. Five Circuits Hold That *Heck* Does Not Bar A § 1983 Plaintiff's Case If Habeas Corpus Is Unavailable.

The majority of circuits to address the question have held that the favorable termination rule of *Heck* does not bar § 1983 plaintiffs who cannot pursue habeas corpus. Several of the decisions of these courts involved allegations, as here, that prison officials miscalculated a sentence or failed to give proper credit.

In *Huang* v. *Johnson*, the Second Circuit considered a Section 1983 action challenging the calculation of a juvenile's credit for time served in a correctional facility against his time of confinement

in juvenile delinquency facilities. 251 F.3d 65, 67 (2d Cir. 2001). After reviewing this Court's rulings in *Heck* and *Spencer*, and noting the opinions of Justices Souter, Ginsburg, and Stevens, the court held that "*Heck* does not bar Huang's Section 1983 action." *Id.* at 75. Although the action was "aimed at the duration" of the confinement, the juvenile had "no habeas remedy because he ha[d] long since been released from [juvenile delinquency] custody." *Id.* Accordingly, because "'five justices hold the view that, where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be [available]," the court concluded "that Huang's Section 1983 claim must be allowed to proceed." *Id.*, quoting *Jenkins* v. *Haubert*, 179 F.3d 19, 26 (2d Cir. 1999).

In another case decided the same year, the Second Circuit held that *Heck*'s favorable termination rule did not bar a Section 1983 case brought by a plaintiff who was ineligible for habeas corpus because he had been assessed a fine rather than incarcerated. *Leather* v. *Ten Eyck*, 180 F.3d 420, 424 (2d Cir. 1999).

The Ninth Circuit has also held that a former prisoner to whom habeas is unavailable may pursue a § 1983 action without satisfying *Heck*'s favorable termination rule. In *Nonnette* v. *Small*, a former prisoner challenged via § 1983 the calculation of his sentence and the revocation of his good-time credits. 316 F.3d 872, 874 (9th Cir. 2002). The court stated that "the crucial question" in the case was: "Does the unavailability of a remedy in habeas corpus because of mootness permit Nonnette to maintain a § 1983 action for damages, even though success in that

action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits?" *Id.* at 876. The court, informed by the concurring and dissenting opinions in *Spencer*, held that "*Heck* does not preclude Nonnette's § 1983 action." *Id.* at 877. The court noted that if *Heck* had decided that the favorable termination rule applied to former prisoners no longer in custody, it would not be "free to consider it undermined by the opinions in *Spencer*." *Id.* at 877 n.5. The court concluded, however, that "*Heck* does not control, and reach[ed] that understanding with the aid of the discussions in *Spencer*." *Id.*

The Seventh Circuit has come to the same conclusion in decisions involving Section 1983 challenges brought by individuals who could not obtain relief through habeas corpus. In *Carr* v. *O'Leary*, the court considered a § 1983 claim brought by a prisoner who lost good time credits for missing the prisoner count even though he was prevented from making the count by a prison riot (that he did not participate in). 167 F.3d 1124, 1125 (7th Cir. 1999). After the suit was filed, the plaintiff was released from prison and could no longer bring a habeas petition. *Id.* at 1127. The defendants asserted *Heck* as a bar to the suit only after summary judgment was granted to the plaintiff on liability. *Id.* at 1125. Writing for the court, then-Chief Judge Posner considered whether the defendants should be relieved of waiving their *Heck* defense, and concluded that although the concurring and dissenting opinions in *Spencer* were inconsistent with a prior Seventh Circuit case, they "cast[] sufficient doubt on the applicability of *Heck* to the

present case to make it unreasonable to relieve the defendants from their waiver of *Heck*." *Id.* at 1127.

Several months after *Carr* was decided, the Seventh Circuit considered a Section 1983 claim brought by a prisoner alleging equal protection and retaliation violations stemming from a disciplinary proceeding that resulted in the loss of his prison job. *DeWalt* v. *Carter*, 224 F.3d 607, 613 (7th Cir. 2000). The court stated that it was "faced squarely with the issue whether Mr. DeWalt may bring his § 1983 action * * * when the underlying disciplinary sanction has not been overturned or invalidated." *Id.* The court reviewed *Preiser*, *Heck*, *Spencer*, and the concurring and dissenting opinions in *Spencer*, observing that the latter "reveal that five justices now hold the view that a § 1983 action must be available to challenge constitutional wrongs where habeas is not available." *Id.* at 614-17. The court held that "that the unavailability of federal habeas relief does not preclude a prisoner from bringing a § 1983 action to challenge a condition of his confinement that results from a prison disciplinary action." *Id.* at 618. To reach this result, the court overruled two pre-*Spencer* decisions that "precluded plaintiffs from pursuing § 1983 actions when federal habeas was not available or when the prisoner had not first availed himself of the option." *Id.* at 617-18 & n. 6.

In *DeWalt*, the Seventh Circuit noted this Court's disapproval of "relying on statements in separate opinions to determine whether a case had been overruled," but stated that it was relying on the opinions in Spencer "not to overrule precedent, but to

help guide us in deciding an open question." *Id.* at 617 n.5.

The Sixth Circuit recently joined the courts holding that *Heck* does not bar a Section 1983 action where habeas corpus is not available. The court previously stated in a footnote that *Spencer* "clearly excludes from *Heck*'s favorable termination requirement former prisoners no longer in custody." *Shamaeizadeh* v. *Cunigan*, 182 F.3d 391, 396 n.3 (6th Cir. 1999). In 2006, the Sixth Circuit confirmed that "the better-reasoned view" is "the logic of those circuits that have held that *Heck*'s favorable-termination requirement cannot be imposed against § 1983 plaintiffs who lack a habeas option for the vindication of their federal rights." *Powers*, 501 F.3d at 603. The Court noted that the courts that have "decreed themselves bound by Heck to the exclusion of Justice Souter's comments in his *Heck* and *Spencer* concurrences" have "mistaken the ordinary rule refinement that appellate courts necessarily engage in for an improper departure from binding Supreme Court precedent." *Id.* at 602. Because the "*Heck* Court was not confronted with a factual scenario * * * in which the § 1983 claimant has no recourse in habeas," *Heck* "offered no binding guidance on the application of the favorable-termination requirement to [those] circumstances." *Id.* at 603.

Finally, In *Harden* v. *Pataki*, the Eleventh Circuit considered a Section 1983 claim challenging the validity of procedures used to extradite a prisoner from Georgia to New York. 320 F.3d 1289 (11th Cir. 2003). The court held that the claim was not barred by *Heck*. *Id.* The court cited the

concurring and dissenting opinions in *Spencer*, noting that "'five justices hold the view that, where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be.'" *Id.* at 1298, quoting *Jenkins*, 179 F.3d at 26. The court held that "because federal habeas corpus is not available to a person extradited in violation of his or her federally protected rights, even where the extradition itself was illegal, § 1983 must be. If it were not, a claim for relief brought by a person already extradited would be placed beyond the scope of § 1983, when exactly the same claim could be redressed if brought by a person to be, but not yet, extradited." *Id.* at 1299, citing *Spencer*, 523 U.S. at 20-21 (Souter, J., concurring).

B. Four Circuits Hold That *Heck* Bars A Section 1983 Plaintiff's Case Even If Habeas Corpus Is Unavailable.

Four circuits, including the Third Circuit below, have take the contrary position that a Section 1983 plaintiff must prove a favorable termination as part of his claim, and therefore the claim is barred when habeas corpus is not available because the prisoner is not in custody.

In the decision in this case, the Third Circuit rejected the concurring and dissenting opinions in *Spencer*, following its prior precedent in *Williams* v. *Consovoy*, 453 F.3d 173 (3d Cir. 2006). *Williams* involved a former prisoner's Section 1983 challenge to a parole officer's decision to detain him, which ultimately resulted in a revocation of parole. *Id.* at 175-76. The court held that although the Section 1983 action was brought while the prisoner was no longer in custody, "a § 1983 remedy is not available

to a litigant to whom habeas relief is no longer available." *Id.* at 177. The court acknowledged that the Second Circuit had held otherwise in *Huang*, but stated, "We decline to adopt *Huang* here." *Id.*

The decision in *Williams* also relied on the Third Circuit's decision in *Gilles* v. *Davis*, 427 F.3d 197 (3d Cir. 2005). *Gilles* acknowledged the concurring and dissenting opinions in *Spencer*, but stated that "these opinions do not affect our conclusion that *Heck* applies" to an individual "who has no recourse under the habeas statute." *Id.* at 210. Judge Fuentes dissented, stating that "[u]nder the best reading of *Heck* and *Spencer* v. *Kemna*, the favorable termination rule does not apply where habeas relief is unavailable." *Id.* at 217 (Fuentes, J., dissenting) (citation omitted).

The First Circuit has reached a similar conclusion. In *Figueroa* v. *Rivera*, a prisoner died while his petition for habeas corpus was pending. 147 F.3d 77, 79 (1st Cir. 1998). Members of the prisoner's family brought a Section 1983 action alleging that public officials had conspired to frame the prisoner for his crime and that other officials failed to provide adequate medical care, resulting in the prisoner's death. *Id.* at 79. The First Circuit held that even though the prisoner's habeas corpus action was mooted by his death, the action was barred by *Heck* because the prisoner's family did not allege that the conviction had been overturned or was subject to any other favorable termination. *Id.* at 80-81. The court held that while the result might work "a fundamental unfairness," the "core holding" of *Heck* was "that annulment of the underlying conviction is an element of a section 1983

'unconstitutional conviction' claim." *Id.* at 80-81. The court was "mindful" that the concurring and dissenting opinions in *Spencer* "may case doubt upon the universality of *Heck*'s 'favorable termination' requirement." *Id.* at 81 n.3. The court believed, however, that its resolution was required in order "to follow [this Court's] directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions." *Id.*

The Fifth Circuit has likewise held that *Heck* bars actions brought by prisoners for whom no habeas remedy is available. In *Randell* v. *Johnson*, as here, the plaintiff claimed that he was not properly credited with time he spent incarcerated and "therefore had to serve the time over again." 227 F.3d 300 (5th Cir. 2000) (per curiam). The court noted that the plaintiff was "no longer in custody and thus can not file a habeas petition," but held that he must nevertheless "satisf[y] the favorable termination requirement of *Heck*." *Id.* at 301. Because he could not do so, "he is barred from any recovery and fails to state a claim upon which relief may be granted." *Id.*

The Eighth Circuit has also held that *Heck* bars a Section 1983 case brought by a prisoner after he has been released. In *Entzi* v. *Redmann*, the plaintiff challenged his loss of sentence-reduction credits for failing to participate in a sex offender treatment course. 485 F. 3d 998, 1003 (8th Cir. 2007). The court rejected the argument that *Heck* did not bar the action because the habeas corpus was no longer available to the plaintiff. *Id.* Noting the concurring and dissenting opinions in *Spencer*, the court nevertheless held, "[a]bsent a decision of the

Court that expressly overrules what we understand to be the holding of *Heck*, however, we decline to depart from that rule." *Id.*

II. *Heck* Does Not Bar A § 1983 Action If Habeas Corpus Is Not Available To The Plaintiff.

The lower court decisions holding that *Heck* bars relief by Section 1983 plaintiffs for whom habeas corpus relief is unavailable are not persuasive. These decisions take the view that *Heck* is "directly applicable precedent" that they must follow "even if that precedent appears weakened by pronouncements in [the Court's] subsequent decisions." *Figueroa*, 147 F.3d at 81 n.3; *see also Entzi*, 485 F.3d at 1003 (declining to depart from "what we understand to be the holding of *Heck*"); *Randell* v. *Johnson*, 227 F.3d at 301 (quoting *Figueroa*); *Gilles*, 427 F.3d at 210 (same); *see also Dible*, 410 F. Supp. at 822 ("[T]he conclusion reached by these courts is premised upon the belief that *Heck* definitively decided, in the negative, the question of whether a prisoner who is precluded from pursuing habeas relief can file a § 1983 action without first meeting the favorable determination requirement.").

But *Heck* did not decide whether a Section 1983 action should be available to a former prisoner who could no longer pursue habeas corpus relief. The facts of *Heck* involved an individual who, unlike Petitioner, was "in custody" for habeas purposes when he brought his § 1983 action. Although the Court stated in a footnote that it did not believe "the principle barring collateral attacks * * * is rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated," 512 U.S. at 490 n.10, that

dictum was not necessary to decide the case and therefore did not constitute "directly applicable precedent" that the lower courts are bound to follow. *Cf. Figueroa*, 147 F.3d at 81 n.3.[6]

Moreover, *Heck* stated that it was dealing specifically with "the intersection" between § 1983 and the habeas corpus statute. 512 U.S. at 480. As Justice Souter's concurrence stated, when habeas corpus is not available to challenge unconstitutional conduct by state officials, the case is "outside the intersection of § 1983 and the habeas statute." 512 U.S. at 500 (Souter, J., concurring). *Heck*'s holding thus did not reach the question presented here or in the other cases forming the circuit split. *See* Fein, 28 New Eng. J. on Crim & Civ. Con. at 23-25 (arguing that the dicta of *Heck*'s footnote 10 was superceded by the concurring and dissenting opinions in *Spencer*, and that lower courts should follow the latter).

For the reasons articulated by Justice Souter's concurring opinion in *Spencer*, when habeas corpus is not available to address an individual's unconstitutional treatment at the hands of state officials, Section 1983 must be. The broad language of Section 1983 covers "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." While *Preiser* and *Heck* limited the

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[6] The same footnote stated that "no real-life example comes to mind" of a case "involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges." *Heck*, 512 U.S. at 490 n.10. However, the instant case and the others forming the circuit split provide numerous such examples.

§ 1983 remedy to avoid conflicts with the habeas corpus statute, no such limitation is needed where there is no conflict between the two. To hold otherwise would create a "patent anomaly" whereby prisoners still in custody have available a forum to address constitutional wrongs, but those who are no longer (or never were) in custody would have no such forum.

Applying *Heck*'s favorable termination rule to cases in which it is impossible as a matter of law to comply with the rule would also create a class of cases in which an individual may be subject to unconstitutional treatment at the hands of state officials, but be left with no avenue of relief. This is particularly true where, as here, the claim is that a person was unconstitutionally kept in prison beyond his lawfully-authorized term. The only possible "favorable termination" in such a case would be a grant of habeas corpus. But so long as the period of unconstitutional imprisonment is shorter than the time it takes to bring and adjudicate a habeas corpus petition, the petition will be moot under *Spencer*. In *White* v. *Phillips*, 34 F. Supp. 2d 1038, 1042 (W.D. La. 1998), then-Chief Judge Little provided an example to illustrate this point:

> What if the prison had detained White two months beyond his prison term without a hearing, but released him before a court could pass on his habeas petition? If *Heck* were an absolute bar to a civil suit absent the favorable outcome showing, White would have no recourse against the state prison in a neutral federal forum for the

> deprivation of his liberty. Such a result patently contradicts § 1983's clear goal of providing a neutral federal forum to air constitutional grievances.

Id.

III. This Case Is An Excellent Vehicle To Decide The Question Presented.

This case presents an ideal vehicle to decide whether *Heck*'s favorable termination rule should bar Section 1983 claims brought by prisoners who cannot pursue habeas corpus. The court of appeals' decision directly implicates the circuit split because it relied solely on *Heck* to affirm the district court's grant of summary judgment. *See* App., *infra*, 3a. Royal was unable to obtain a "favorable termination" to satisfy *Heck* principally because the period of his unconstitutional detention was too short to complete even the state postconviction relief procedures, much less a habeas corpus proceeding.

Should Mr. Royal prevail before the Court, he has substantial arguments on the merits that the court of appeals did not reach because of its imposition of the *Heck* bar. On his Eighth Amendment claim, the district court erroneously held that Mr. Royal "failed to proffer sufficient evidence from which a factfinder could find the existence of deliberate indifference on the part of" Respondent, *id.* at 13a; however, the Third Circuit has held that deliberate indifference is demonstrated "where prison officials were put on notice and then simply refused to investigate a claim of sentence miscalculation." *Moore* v. *Tartler*, 986 F.2d 682, 686 (3d Cir. 1993). The evidence here—particularly

when viewed in the light most favorable to Mr. Royal (as the district court was bound to do)—shows that Respondent did not undertake any meaningful investigation of Royal's claims. Respondent's "investigation" proceeded no further than to express doubt that he could obtain documentation of Mr. Royal's periods of incarceration, and Respondent refused to investigate the claim when Mr. Royal provided documentation.[7] Respondent never came to a conclusion one way or the other as to whether Mr. Royal was entitled to credit for the time he served in 1983 and 1984.

For the same reason, the district court was incorrect to hold that Mr. Royal "failed to point to evidence from which a factfinder would find that his [Due Process] claim was not meaningfully and expeditiously considered" by Respondent. App., *infra*, 15a. In so holding the district court relied on a minor correction of the credit for time Mr. Royal served in 1999. *Id.* The correction of a three-day error from 1999, however, cannot constitute meaningful consideration of Mr. Royal's request for 180 days credit for time served in 1984 and 1985. At a minimum, Mr. Royal should be entitled to have these arguments considered by the court of appeals.

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[7] Respondent also relied on an interpretation of Pennsylvania sentencing law that was contrary to every reported case on the subject. *See supra*, n. 3.

IV. The Question Is Important And Recurring And Will Not Benefit From Further Consideration In The Courts Of Appeals.

The numerous appellate and district court cases that have addressed the question of whether *Heck* bars a § 1983 suit when habeas is not available demonstrate that the issue is recurring. *See* Fein, 28 New Eng. J. on Crim. & Civ. Confinement at 25 ("The issue has and will continue to recur, given the numerosity of 1983 and 2254 cases."); *see also id.* at 9-13 (collecting cases). The issue is also important. As this Court has recognized, "Congress enacted § 1983 and its predecessor, § 2 of the Civil Rights Act of 1866, 14 Stat. 27, to provide an independent avenue for protection of federal constitutional rights." *Pulliam* v. *Allen*, 466 U.S. 522, 540 (1984). The courts are now intractably divided on whether that avenue is available when habeas corpus is not, leaving the question of whether an individual's constitutional rights can be upheld not to the wisdom of a neutral decisionmaker, but to the accident of geography.

To date, nine courts of appeals and numerous district courts have weighed in on the question of whether *Heck*'s favorable termination requirement applies to § 1983 claimants who cannot pursue relief through habeas corpus. The issue has attracted the attention of scholarly articles, which conclude that the majority opinion of the courts of appeals be adopted. *See* Note: *Defining the Reach of* Heck *v.* Humphrey, *Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?* 121 Harv. L. Rev. at 889; Fein, 28 New

Eng. J. on Crim. & Civ. Confinement at 25. These authorities have considered this Court's prior cases, along with their concurring and dissenting opinions, the text and intent of § 1983 and the habeas corpus statute, and the policy considerations on both sides of the issue. The issue has been fully considered, the circuits have staked out their positions, and issue is now framed for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2007

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1036

HOZAY ROYAL

also known as

CHARLES JOHNSON

v.

ROBERT DURISON;

VIVIAN T. MILLER*

Hozay Royal,

Appellant

(*Dismissed pursuant to Order of 5/29/07)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. No. 03-cv-04441)

District Judge: Honorable Eduardo C. Robreno

Argued October 3, 2007

Filed: November 20, 2007

Before: McKEE, BARRY and FISHER, Circuit Judges.

OPINION OF THE COURT

FISHER, Circuit Judge.

Hozay Royal instituted this lawsuit pursuant to 42 U.S.C. § 1983, seeking monetary damages from certain Pennsylvania officials for failure to recalculate his sentence and to credit him with time served prior to his original sentence. He argues that the government's alleged inaction violated his right to due process and the prohibition on cruel and unusual punishment. He also argues that the decision in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), does not bar his claim. For the reasons that follow, we disagree and will affirm the order of the District Court on the alternative grounds that Royal's claim is barred by *Heck*.

I.

We write exclusively for the parties, who are familiar with the factual context and legal history of this case. Therefore, we will set forth only those facts necessary to our analysis.

On July 31, 2003, Hozay Royal filed a § 1983 claim against defendants Robert Durison and Vivian Miller (both Philadelphia County officials). The claim alleged that the defendants violated Royal's Eighth and Fourteenth Amendment rights by failing to respond properly to his claim that he had not been credited for time served prior to sentencing, causing him to serve a sentence in excess of the maximum statutory term. On May 27, 2004, the District Court granted summary judgment for the defendants on the substantive claims. Royal filed a timely appeal, and on April 21, 2005, we issued an order directing the parties to address whether *Heck* v. *Humphrey*,

512 U.S. 477 (1994), which was not relied upon in the District Court's opinion, barred Royal's claim as a threshold matter. Following argument before this Court on October 3, 2007, we hold that *Heck* does, in fact, bar Royal's claim.

II.

We exercise jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over questions of law. *See, e.g.*, *Epstein Family P'ship* v. *Kmart Corp.*, 13 F.3d 762, 765-66 (3d Cir. 1994). We are permitted to affirm the District Court on any grounds with factual support in the record, *Nicini* v. *Morra*, 212 F.3d 798, 805 (3d Cir. 2000) (en banc), and may affirm the District Court's order "on grounds different than those used by the lower court in reaching its decision." *Erie Telecomms.* v. *Erie*, 853 F.2d 1084, 1089 n.10 (3d Cir. 1988).

III.

In *Heck*, the Supreme Court announced that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," the plaintiff must, as a threshold matter, show that there has been a "favorable termination" of his prior proceedings by demonstrating that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. at 486-87. As the United States Court of Appeals for the Second Circuit has explained, the Supreme

Court's rationale in *Heck* "was based, in part, on a desire to 'avoid[] parallel litigation over the issues of probable cause and guilt,' prevent 'the creation of two conflicting resolutions arising out of the same or identical transaction,' and preclude 'a convicted criminal defendant [from making a] . . . collateral attack on the conviction through the vehicle of a civil suit.'" *Huang* v. *Johnson*, 251 F.3d 65, 73 (2d Cir. 2001) (quoting *Heck*, 512 U.S. at 484). As the Supreme Court further elaborated in *Wilkinson* v. *Dotson*, 544 U.S. 74 (2005), a § 1983 claim filed by a state prisoner is barred, regardless of the target of the lawsuit, if success in the § 1983 action "would necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 82. Royal does not allege that his prior proceedings were favorably terminated, and therefore he must show that success on the instant claim would not necessarily "demonstrate the invalidity" of his incarceration in a legally cognizable manner.

Royal's first claim is that his Eighth Amendment rights were violated when he "was incarcerated for more than six months in excess of the maximum sentence allowed under Pennsylvania law[.]" (Appellant's. Br. 17). Even if true, this claim is not cognizable under *Heck*. Were we to hold that the Commonwealth of Pennsylvania did, in fact, incarcerate Royal beyond the statutory maximum, we would necessarily be holding that the "confinement or its duration" was invalid in violation of the favorable termination requirement announced in *Heck*. *Id.*

Royal's second claim is that his due process rights were violated when defendants failed to

properly investigate his allegation that his time served had been improperly calculated. Royal contends that had defendants "meaningfully and expeditiously considered" these allegations, they would have discovered documents showing that his time had been improperly calculated. Royal alleges that this claim is not barred by *Heck*, because he is not calling into question the validity of the sentence or the conviction, but rather just the calculation of time served. This argument is unavailing. In *Williams* v. *Consovoy*, 453 F.3d 173 (3d Cir. 2006), we held that a state prisoner's claim – that prison authorities failed to adequately investigate his likelihood of recidivating, leading to a denial of his parole – was barred by *Heck*. *Id.* at 177. Although Royal attempts to distinguish *Williams* on the ground that "the conduct Williams challenged, if proved true, would have resulted in a ruling that he should never have been returned to prison" (Appellant's Br. 31), there is no indication in the opinion that *Heck* only bars claims that, if established, would invalidate an entire sentence, rather than simply part of a sentence. *See, e.g.*, *Heck*, 512 U.S. at 482-83 (discussing the application of the doctrine in the context of a prisoner's deprivation of good-time credits, not the entirety of his sentence).

Finally, Royal argues that Heck should not apply in this case because he cannot, at this point, file a habeas petition to challenge any aspect of his incarceration. While several Courts of Appeals have concluded that *Heck*'s favorable termination

requirement does not apply to a prisoner no longer in custody,[1] we have expressly declined to adopt this rule. *Williams*, 453 F.3d at 177-78. Since Royal has therefore not established the favorable termination requirement, his § 1983 claim cannot go forward.

IV.

For the foregoing reasons, we will affirm the order of the District Court on the alternate grounds that it is barred by *Heck*.

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[1] *See, e.g.*, *Huang*, 251 1 F.3d at 74; *Shamaeizadeh* v. *Cunigan*, 182 F.3d 391, 396 (6th Cir. 1999); *DeWalt* v. *Carter*, 224 F.3d 607, 617 (7th Cir. 2000).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION 03-4441

HOZAY ROYAL, a/k/a CARLOS JOHNSON,

Plaintiff,

v.

ROBERT DURISON and VIVIAN T. MILLER,

Defendants.

MEMORANDUM

EDUARDO C. ROBRENO, J. MAY 26, 2004

This action is brought under 42 U.S.C. § 1983 by Hozay Royal, a/k/a Carlos Johnson ("plaintiff"), who alleges that his constitutional rights were violated by Robert Durison and Vivian T. Miller (collectively "defendants") during his imprisonment for three felony convictions. Specifically, plaintiff claims that he was detained for approximately six months in excess of the statutorily prescribed maximum for the crimes in which he was convicted, thus violating his Eighth Amendment right against excessive imprisonment; and that defendants failed to give meaningful and expeditious consideration to plaintiff's request for adjustment of pre-commitment time, thus violating his Fourteenth and Fifth Amendment rights to procedural due process.

Presently before the Court are the parties' cross- motions for summary judgment. For the reasons that follow, defendants' motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

I. BACKGROUND[1]

On or about March 26, 1983, plaintiff was arrested and detained for retail theft. By posting bail, plaintiff was released from detention on April 14, 1983 and a preliminary hearing was scheduled for April 28, 1983. Because plaintiff failed to appear for the scheduled preliminary hearing, a bench warrant was issued on April 28, 1983. On or about July 29, 1984, plaintiff was arrested for a separate retail theft charge, and rearrested pursuant to the bench warrant. On November 15, 1983, plaintiff entered a guilty plea to the two retail theft charges and a single charge of failing to appear for a court appearance.

On or about January 25, 1984, plaintiff was sentenced to two to four years of imprisonment for each offense, to run concurrently, followed by three years of probation, to run consecutively, as a result of the three felony convictions. Plaintiff served the maximum term of detention according to the sentence, and was released on or about January 25, 1987 subject to certain terms of probation. During the probation period, plaintiff was arrested on new charges and detained on February 16, 1999. Although the charges which warranted the new arrest were eventually dismissed, plaintiff was sentenced on October 12, 1999 to one and a half to three years incarceration for violating the terms of his probation.

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[1] Unless otherwise noted, the following facts are not contested by the parties

While serving his sentence for violating the terms of his probation, plaintiff received a sentence status summary report. The report indicated that plaintiff was being credited for time served between February 19, 1999 to October 12, 1999. In late October, plaintiff sent defendant Durison, who was the Director of Classification for the Philadelphia Prison System, a letter requesting that the pre-commitment time served from March 26, 1983 to April 14, 1983 and July 29, 1983 to January 25, 1984 -- a period totally approximately 6 months — be credited towards his sentence.

In a letter dated November 15, 1999, Durison responded to plaintiff's request indicating that plaintiff's request was being rejected. After conducting a personal investigation into the matter, Durison concluded (and notified plaintiff) that the microfilm for the period in question was not available and that in any event, plaintiff's pre-commitment time was properly credited if plaintiff was being incarcerated for violating probation.

Convinced that all of his pre-commitment time was not properly being credited, plaintiff again wrote Durison on January 16, 2000. Durison wrote a letter to Inmate Records on March 14, 2000 acknowledging a minor error (February 16, 1999 to October 12, 1999 instead of February 19, 1999 to October 12, 1999) in pre-commitment credit. Plaintiff was copied on this letter.

In August or September of 2000, plaintiff filed a Post Conviction Relief Act (PCRA) petition in the Pennsylvania courts seeking to receive what plaintiff still believed was the proper pre-commitment credit. During the pendency of the petition, plaintiff alleges

(and both defendants deny) that he sent additional correspondences to Durison in letters dated July 28, 2001 and August 27, 2001 and a letter to defendant Miller, dated October 6, 2001. On October 30, 2003, plaintiff's PCRA petition was denied as moot plaintiff having been released from prison and no longer serving his sentence.

In the instant action, plaintiff claims that his Eighth Amendment right against excessive punishment was violated because he was imprisoned for a term longer than that prescribed by statute for the crimes in which plaintiff was convicted.[2] Plaintiff also alleges that his Fifth and Fourteenth Amendment rights to procedurally due process were violated when Durison and Miller failed to take "meaningful and expeditious" action to ensure that plaintiff was properly credited pre-commitment time.

II. DISCUSSION

A. The Standard for Summary Judgment.

A court may grant summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" only if its existence or non-existence would affect the outcome

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[2] Plaintiff asserts that the maximum statutory term of imprisonment for the three convictions is seven years. According to plaintiff's arithmetic, he served just over seven and half years in connection with the convictions at issue.

of the suit under governing law. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). An issue of fact is "genuine" only when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. *Id.* In determining whether there exist genuine issues of material fact, all inferences must be drawn, and all doubts must be resolved, in favor of the non-moving party. *Coregis Ins. Co.* v. *Baratta & Fenerty, Ltd.*, 264 F.3d 302, 305-06 (3d Cir. 2001) (citing *Anderson*, 477 U.S. at 248).

Although the moving party bears the burden of demonstrating the absence of a genuine issue of material fact, in a case such as this, where the non-moving party is the plaintiff, and therefore, bears the burden of proof at trial, that party must present affirmative evidence sufficient to establish the existence of each element of his case. *Id.* at 306 (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986)). Accordingly, a plaintiff cannot rely on unsupported assertions, speculation, or conclusory allegations to avoid the entry of summary judgment, *see Celotex*, 477 U.S. at 324, but rather, she "must go beyond the pleadings and provide some evidence that would show that there exists a genuine issue for trial." *Jones* v. *United Parcel Service.*, 214 F.3d 402, 407 (3d Cir. 2000).

B. Plaintiff's Eighth Amendment Claim.

To establish § 1983 liability in this context, a plaintiff must first demonstrate that a prison official had knowledge of the contention that the sentence the prisoner is serving has been incorrectly calculated and thus of the risk that unwarranted

punishment was being, or would be, inflicted. *Sample* v. *Diecks*, 885 F.2d 1099, 1110 (3d Cir. 1989). Second, the plaintiff must show that the official either failed to act or took only ineffectual action under the circumstances indicating that his or her response to the problem was a product of deliberate indifference to the prisoner's plight. *Id.* Lastly, a prisoner must show a causal connection between the official's response to the problem and the infliction of the unjustified detention. *Id.*

Assuming at this stage that plaintiff's pre-commitment time was improperly credited and that, therefore, plaintiff's sentence was in excess of the maximum term mandated by statute in Pennsylvania, plaintiff's Eighth Amendment claim fails because he has failed to establish that the excessive detention was the result of deliberate indifference by prison officials.

Once Durison was notified by plaintiff of a possible miscalculation in pre-commitment time, he conducted a personal investigation into the matter. He found that the relevant records for the period in question were missing and that in any event, plaintiff's pre-commitment time was properly credited if plaintiff was being incarcerated for violating probation. Within weeks of receiving plaintiff's first letter, Durison responded to the plaintiff in a handwritten note and notified plaintiff as to the circumstances which prevented him from granting plaintiff's request. Two months after receiving plaintiff's second letter, Durison copied plaintiff on a letter to the Inmate Records indicating that a change in the pre-commitment credit was

being made due to what appears to have been a minor clerical error.

Deliberate indifference may be shown when a prison official "fail[s] to address a sentence calculation problem brought to his attention . . . ." *Sample*, 885 F.2d at 1110. It has been demonstrated "in those cases where prison officials were put on notice and then simply refused to investigate a prisoner's claim of sentence miscalculation." *Moore* v. *Tartler*, 986 F.2d 682, 686 (3d Cir. 1993)(citing *Alexander* v. *Perrill*, 916 F.2d 1392, 1398 (9th Cir. 1990)). Here, plaintiff has failed to offer sufficient evidence that Durison failed to address or "simply refused to investigate" plaintiff's situation. To the contrary, it is undisputed that Durison investigated the circumstances surrounding plaintiff's multiple arrests, multiple convictions, sentence and probation, and notified plaintiff in two separate correspondences that Durison was unable to change the period of the sentence by crediting pre-commitment time served, as requested by plaintiff. Indeed, Durison found a minor discrepancy in the pre-commitment credit dates and notified plaintiff of a change to correct the error. Given these circumstances, the Court finds that, once put on notice of plaintiff's concerns, Durison discharged his duty to address the potential sentencing calculation problem by investigating the matter and notifying plaintiff as to what the results of the investigation were. The Court, therefore, concludes that plaintiff has failed to proffer sufficient evidence from which a factfinder could find the existence of deliberate indifference on the part of Durison.

Plaintiff's Eighth Amendment claim against defendant Miller also fails. Miller is the Clerk of Quarter Sessions in Philadelphia County. Her office keeps the records and files used to determine whether or not pre-commitment time should be credited. Although Miller performed what she calls "an extensive search" for plaintiff's records, she has no personal involvement in calculating time for inmate sentences. For this reason, the Court finds that plaintiff has failed to establish the third prong of an excessive imprisonment claim, *i.e.*, a causal connection, between Miller's conduct and plaintiff's alleged excessive imprisonment. With no authority to calculate plaintiff's sentence, Miller cannot be held liable for any miscalculation of the sentence. Moreover, the fact that Miller failed to respond to plaintiff's letter in October of 2001 does not establish deliberate indifference because others, Durison in this case, were available to pursue and address the matter. *Sample*, 885 F.2d at 1110; *see also Durmer* v. *O'Carroll*, 991 F.2d 64, 67 (3d Cir. 1993) (finding that prison officials have no duty to respond to prisoner complaints when other officials are already addressing the complaints).

For these reasons, the Court finds that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law with regard to plaintiff's Eighth Amendment claim. Thus, plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted as to this claim.

C. Plaintiff's Fifth and Fourteenth Amendments Claim.

In support of his due process claim, plaintiff alleges that "[t]he process that [he] received in connection with the rejection of his claims was constitutionally inadequate" because his request for consideration of the alleged sentencing calculation error was not given "meaningful" and "expeditious" consideration.

The Third Circuit has held that, because a prisoner's interest in avoiding wrongful detention is a strong one, due process entitles a prisoner with a meaningful and expeditious consideration of claims that the term of prisoner's sentence has been miscalculated. *Sample*, 885 F.2d at 1115. Plaintiff in this case has failed to point to evidence from which a factfinder would find that his claim was not meaningfully and expeditiously considered by defendants.

As noted above, the evidence demonstrates that, once Durison was notified of a potential problem, he investigated the matter and wrote plaintiff a response within weeks. Two months after receiving a second letter from plaintiff concerning the calculation of pre-commitment credit, Durison copied plaintiff on a letter to Inmate Records indicating that a small adjustment was being made. Although the adjustment was not the relief that plaintiff sought, "[t]he failure of a prison official to provide a favorable response to an inmate grievance is not a federal constitutional violation." *Gordon* v. *Vaughn*, 1999 U.S. Dist. LEXIS 7060, at *4 (E.D. Pa. May 12, 1999)(citing *Adams* v. *Rice*, 40 F.3d 72, 74 (4th Cir. 1994), cert. denied, 514 U.S. 1022 (1995)).

That subsequent letters addressed to Durison regarding the same issue may have been ignored does not implicate plaintiff's due process rights because plaintiff's concerns had already been investigated and addressed by this time.

As for Miller, she had no duty to respond to the letter alleged to have been sent to her by plaintiff given that another prisoner official, Durison, was already addressing plaintiff's issues. *Durmer*, 991 F.2d at 67. For these reasons, summary judgment is granted in favor of defendants and against plaintiff as to the due process claim.

III. CONCLUSION

In view of the forgoing discussion, plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION 03-4441

HOZAY ROYAL, a/k/a CARLOS JOHNSON,

Plaintiff,

v.

ROBERT DURISON and VIVIAN T. MILLER,

Defendants.

ORDER

AND NOW, this 26th day of May 2004, in accordance with the accompanying memorandum, it is hereby ORDERED that defendants' motion for summary judgment is GRANTED and plaintiff's motion for summary judgment is DENIED.

It is FURTHER ORDERED that JUDGMENT is entered against plaintiff and in favor of defendants as to all of plaintiff's claims.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION 03-4441

HOZAY ROYAL, a/k/a CARLOS JOHNSON,

Plaintiff,

v.

ROBERT DURISON and VIVIAN T. MILLER,

Defendants.

ORDER

AND NOW, this 21st day of December 2004, it is hereby ORDERED that Plaintiff's motion to amend/alter judgment (doc. no. 26) is DENIED[1] and the case shall be marked CLOSED.

---

[1] On May 26, 2004, the Court issued a Memorandum and Order granting Defendants' motion for summary judgment and denying Plaintiff's motion for summary judgment as to all of Plaintiff's claims. Plaintiff now asks the Court to reconsider that ruling.

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp.* v. *Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). "A motion for reconsideration is not an opportunity for a party to present previously available evidence or new arguments." *Federal Deposit Ins. Corp.* v. *Parkway Executive Office Center*, Nos. 96-121 & 96-122, 1997 U.S. Dist. LEXIS

(...continued)

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

14939, at *3 (E.D. Pa. Sept. 24, 1997) (citing *Corrigan* v. *Methodist Hosp.*, 885 F. Supp. 127, 127 (E.D. Pa. 1995)). Nor is a motion for reconsideration an opportunity to rehash arguments already briefed. *Pharmastem Therapeutics, Inc.* v. *Viacell*, No. 02-148, 2004 WL 2898061, *1 (D. Del. Dec. 14, 2004).

In his motion, Plaintiff argues, with respect to his Eighth Amendment claim, that the Court erred in deciding that Defendants were not deliberately indifferent in failing to credit Plaintiff with pre-commitment time served. This is simply a rehashing of the same argument made in his motion for summary judgment. Moreover, in support of his argument, Plaintiff cites *Sample* v. *Diecks*, 885 F.2d 1099, 1110 (3d Cir. 1989), a case relied upon and cited heavily by the Court in its decision to grant Defendants' motion for summary judgment and to deny Plaintiff's motion for summary judgment. The only other precedent cited by Plaintiff are two non-binding decisions from the Ninth Circuit, which were both cited in Plaintiff's brief in support of his motion for summary judgment. Therefore, for the same reasons as set forth in the Court's May 26, 2004 Memorandum, Plaintiff's motion for reconsideration is denied.

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No. 07-1056

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

HOZAY ROYAL,

Petitioner,

v.

ROBERT DURISON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a former prisoner who had ample opportunity over the course of sixteen years to challenge his sentence by a direct appeal, by a state court collateral attack, and by a federal court habeas petition can file a § 1983 action to challenge that same sentence, notwithstanding the bars of *Heck v. Humphrey*, issue preclusion, and the statute of limitations.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

In 1984, Hozay Royal learned that he apparently did not receive credit in his criminal sentencing for time he served prior to the imposition of that sentence. Yet Royal waited almost sixteen years to raise the issue with the courts.

Dissatisfied with negative court rulings and prison officials unwilling to take on the role of a court, Royal filed the instant § 1983 action against respondent Robert Durison. Royal now asks this Court to give him yet another chance to lodge a collateral attack on the sentences imposed on him by the Pennsylvania courts.

Royal's alleged lack of access to potential collateral attacks on his sentence is his own fault: to date, no Circuit Court has ruled that a prisoner who can bring a substantive challenge to his sentence through a direct appeal, a state court collateral attack on that sentence, and a federal habeas petition, yet elects to delay any such challenge, should be rewarded afte the fact with the option of a § 1983 suit in federal court.

Furthermore, Royal's petition ignores both this Court's case law regarding the preclusive effect of state court judgments on § 1983 lawsuits and this Court's determination that former prisoners are not exempt from the applicable § 1983 statute of limitations when their claims are indeed separable from their state court convictions and sentences.

Therefore, respondent Robert Durison respectfully requests that this Court deny Hozay Royal's petition to review the judgment of the Court of Appeals of the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. The opinion of the District Court is reported at *Royal v. Durison*, 319 F. Supp.2d 534 (E.D. Pa. 2004).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by petitioner, this matter also involves Section 1738 of Title 28 of the United States Code. Section 1738 provides in pertinent part:

> The records and judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

A. 1983-84: Royal's Original Convictions and Sentences.

On November 15, 1983, plaintiff Hozay Royal pled guilty to three felony counts of retail theft in the Philadelphia Court of Common Pleas. C. A. App. ("A.") at 34. Prior to his guilty plea, Royal was detained due to a number of pending bench warrants or "detainers" issued by Philadelphia County and nearby Montgomery County. A. at 34, C. A. Supp. App. ("SA.") at 48-49. Royal remained in detention after his guilty plea. A. at 34, SA. at 48-49.

1. Sentence One (The "Philadelphia Sentence").

On January 25, 1984, the Philadelphia Court of Common Pleas sentenced Royal to two to four years in prison on each of the three counts, to run concurrently, and three three-year probation terms, which were to run consecutively. A. at 34, 36, 54.

Therefore, the Philadelphia Sentence was a range of two to four years of incarceration, followed by a nine year probation term. A. at 34, 36.

Royal's contention is that he did not receive approximately 180 days of presentence time credit for time detained while awaiting the Philadelphia Sentence: from March 27, 1983 to April 14, 1983, and from July 30, 1983 to January 25, 1984. SA. at 90.

2. Sentence Two (The "Montgomery County Sentence").

On April 5, 1984, Royal was sentenced for a Montgomery County retail theft conviction. SA. at 79. Royal was sentenced to one and a half to three years of incarceration. SA. at 79-80. This sentence was to be served consecutively to the Philadelphia Sentence. SA. at 79-80.

3. Royal Receives An Aggregate Sentence That Combines The Philadelphia Sentence and the Montgomery County Sentence Into One Incarceration Term.

After the Montgomery County Sentence was imposed, the two sentences were aggregated, which adjusted Royal's minimum and maximum dates of incarceration. SA. at 19, 80. This aggregation resulted in the following sentence:

A three and one half to seven year incarceration term, followed by nine years of probation. SA. at 80.

B. April 1984: Royal Enters State Prison and Realizes He Allegedly Did Not Receive Credit for Time Served. He Does Nothing.

On April 9, 1984, Royal entered the Pennsylvania correctional system to begin serving his aggregate sentence. A. at 35. At his deposition, plaintiff conceded that he first learned of any alleged failure to receive presentence time credit when he entered

SCI-Graterford, a state prison, to begin serving that aggregate sentence. A. at 35, SA. at 22, 24. Despite this knowledge, Royal did not file a Pennsylvania Post-Conviction Hearing Act petition (now known as a Post-Conviction Relief Act or "PCRA" petition); or, for that matter, a § 1983 action. SA. at 15, 79-80.[1]

Royal contends that he was released from prison on January 25, 1988, four years after his original sentencing date. A. at 35. Royal served the remaining three years of parole on his aggregated sentence, and then began to serve his nine-year probationary period. SA. at 80.

C. 1999: While On Probation, Royal Is Convicted on a New Set of Charges. The Philadelphia Court of Common Pleas Rules that He Has Violated His Probation and Imposes a 1½ to 3 Year Sentence of Incarceration.

Royal did not complete all nine years of his probation. While serving his third three-year probation-term, he was arrested once again on new charges and was detained on February 19, 1999. A. at 44-45, SA. at 29. Royal pled guilty to these new charges on September 9, 1999. SA. at 92.

---

[1] Royal did not file a direct appeal of any of the 1984 sentences. SA. at 79-80.

After a series of hearings, on October 12, 1999, the Philadelphia Court of Common Pleas found that Royal had violated his probation due to his new conviction. A. at 37, SA. at 80. Royal was sentenced to one and a half to three years of incarceration for violating the terms of his probation. A. at 37.

Under Pennsylvania law, a violation of probation sentence, when combined with the initial sentence, cannot exceed the statutory maximum sentence that could be imposed on that defendant. *See* 42 Pa. Cons. Stat. Ann. § 9771(b) (court has same options when revoking probation as it had at the initial sentencing, with due consideration for time on probation); *McCray v. Dep't of Corrections*, 872 A.2d 1127, 1132 (Pa. 2005) (where revocation of probation sentence, combined with initial sentence, was within statutory maximum for defendant's crimes, sentence was not illegal); *Commonwealth v. Bowser*, 783 A.2d 348, 350-51 (Pa. Super. Ct. 2001) (same).

Royal was serving his last three-year term of probation at the time of the revocation, and the statutory maximum for one count of a third-degree felony is seven years of incarceration. 18 Pa. Cons. Stat. Ann. § 1103(3). The initial Philadelphia Sentence included a two to four year incarceration term. A. at 34, 36, 54. Therefore, on its face, the one and a half to three year probation revocation sentence remained within the seven year limit. A. at 37, SA. at 80.

D. 1999: Prior to Sentencing on His Probation Violation, Royal Begins "Thinking" About Addressing Any Alleged Lack of Time Credit. He Waits for a Year and a Half to Raise the Question with the Pennsylvania Courts.

In April of 1999, at least five months prior to the actual *sentencing* on his probation violation, Royal began "thinking" about addressing any potential failure to receive presentence time credit in 1984. A. at 59. Royal then waited until September of 2000, almost a year and a half later, to raise the issue with the courts.

In September 1999, Royal filed a petition for review in the Pennsylvania Commonwealth Court, in which he challenged his probation violation sentence. SA. at 104. He did not raise any claim in this action regarding failure to receive time credit. SA. at 105. On June 16, 2000, the Commonwealth Court denied and dismissed plaintiff's petition for relief at *Royal v. Pennsylvania Bd. of Probation and Parole*, 507 MD 1999.

Royal filed a direct criminal appeal from the probation violation sentence. SA. at 80. Once again, Royal failed to raise any claim regarding the alleged failure to receive credit for time served, and instead chose to argue that his two sentences had been improperly aggregated, so he should not have received any incarceration term at all. SA. at 80-81. The Pennsylvania Superior Court affirmed the order revoking Royal's probation and imposing a one and a

half to three year sentence on October 13, 2000, at *Commonwealth v. Royal*, 3135 EDA 1999. SA. at 81.

In September 2000, plaintiff filed a PCRA petition where he sought credit for time served from July 30, 1983 to January 25, 1984. SA. at 102. In that petition, Royal made the argument he sets forth in the instant § 1983 action: he claimed that if he did not receive credit for time served prior to the Philadelphia Sentence, he would serve an illegal sentence beyond the maximum incarceration term for his crimes. SA. at 102.

On October 30, 2002, the Common Pleas Court denied Royal's petition as moot given that Royal had been released from prison on February 16, 2002 and had completed his sentence. SA. at 102. Royal appealed to the Pennsylvania Superior Court, which affirmed the denial. SA. at 102-03.

E. 2000-2002: Royal Files Habeas Petitions in Federal Court.

In December 2000, Royal filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. SA. at 81. In that petition, Royal argued that the aggregation of the Philadelphia Sentence and the Montgomery County Sentence was improper, so the imposition of the one and a half to three year violation of probation sentence violated both due process and double jeopardy guarantees. SA. at 80-81, 82-85. The District

Court denied this habeas corpus petition on the merits on February 21, 2002. SA. at 88-89.

Meanwhile, on September 13, 2001, plaintiff attempted to amend his petition to include the PCRA argument (i.e., the argument he later raised in his § 1983 action) that he did not receive credit toward his probation violation sentence for time served prior to the Philadelphia Sentence. SA. at 90. The District Court denied Royal's proposed amendment, and Royal attempted to add this claim once again by filing a motion to alter or amend the judgment, which the District Court also denied on February 22, 2002. SA. at 90-91. The District Court denied Royal's motion on the grounds that the claim had been procedurally defaulted and because Royal's PCRA petition was still pending. SA. at 90-91.

F. 1999-2001: Royal Writes to Durison and Asks Durison to Give Him Credit for Time Served in 1983 and 1984.

Meanwhile, on April 12, 1999, Royal wrote to Robert Durison, Director of Classification, Movement, and Registration for the Philadelphia Prison System, requesting that approximately six months of time that he served prior to the Philadelphia Sentence be credited toward the sentence imposed for his violation of probation in 1999. A. at 52.

Before receiving a response, Royal sent another request to Durison on April 28, 1999. A. at 51. Royal again cited to the three felony convictions that

resulted in the Philadelphia Sentence and claimed that he did not receive time credit for July 1983 to January 25, 1984. A. at 51. Durison considered his request and sent the following response on May 4, 1999: "This is a state parole issue and I doubt that we can confirm any time from that period that wasn't applied to [Royal's] state sentence when he was sent to the SCI." A. at 51. Royal did not receive this response. SA. at 12-13.

In October 1999, Royal sent another letter to Durison from SCI-Camp Hill, another state prison. A. at 49-50. In that letter, he again asked that he receive time credit for six months time served prior to the Philadelphia Sentence in 1984. A. at 49-50.

Upon receiving this letter, Durison again considered Royal's request and personally investigated it. SA. at 84. On November 15, 1999, Durison wrote Royal a letter in which he informed him that the custody records (automated or microfilm) from the relevant time periods in 1983 and 1984 were unavailable, and that the court database was not helpful in researching his request. A. at 47-48, SA. at 84. Durison's review of the court records indicated that Royal's claimed six months of time served could have been applied to four sentences other than the Philadelphia Sentence: 1) the Montgomery County sentence; 2) a county parole back-time sentence; 3) another Philadelphia County criminal case; or 4) a state parole back-time sentence. SA. at 48-49. *See Commonwealth v. Merigris*, 681 A.2d 194, 195 (Pa. Super. Ct. 1996) ("The operative rule . . . is that a

defendant should receive credit only once for time served before sentencing" rather than multiple grants of credit for unrelated sentences); *Commonwealth v. Hollawell*, 604 A.2d 723, 726 (Pa. Super. Ct. 1992) (rejecting an argument to have same period of time credit applied to unrelated sentences, stating, "[t]his court does not deal in 'volume discounts'"). In the absence of custody records from 1983 or 1984, Durison could not recommend to the Department of Corrections to recalculate Royal's incarceration dates to include an extra six months of time served, nor could Durison tell Royal if the time credit had been applied elsewhere in 1983 and 1984. SA. at 48-49.

In the absence of custody records, Durison also informed Royal that, "If there was a consecutive probation on the above case which you are in violation of, the only precommitment credit to which you are entitled is what you already received (i.e.[,] from the time of your last incarceration)."[2] A. at 48.

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[2] Petitioner criticizes this statement, but contrary to his assertions, Durison's presumption that the Department of Corrections would not credit plaintiff for time served if he was serving a consecutive term of probation was proper under Pennsylvania law. If an inmate is serving a consecutive term of probation – i.e., a probation term occurring after incarceration – at the time a violation of probation sentence is imposed, the general presumption is that he has already been credited with time served. *See Aviles v. Department of Corrections*, 875 A.2d 1209, 1213 (Pa. Commw. Ct. 2005) (noting that release from incarceration to a consecutive probation portion of a sentence "only occurs when the preceding total confinement portion of the sentence is satisfied," which is presumed to include credit for

(Continued on following page)

Durison further explained that the Pennsylvania Department of Corrections "would not credit you for any time spent on your prior jail sentence in this case." A. at 48.

Finally, Durison advised Royal to speak with a Records Specialist at Camp Hill prison. A. at 47. Durison also copied the Department of Inmate Records at SCI-Camp Hill on his letter. A. at 48.

Royal received Durison's letter denying his request. SA. at 18, 27-28.

On January 16, 2000, Royal sent Durison another letter making the same request for time served in 1984; his letter included an additional request for time served beginning on February 16, 1999. SA. at 45. Upon reviewing the custody records from 1999, which were available, Durison discovered a discrepancy in the records and determined that Royal should be credited for three additional days of time served, and recommended to SCI-Camp Hill that Royal receive sentence credit for the three days, "if not already applied on another matter." A. at 44-45, SA. at 48.

Royal was sent a carbon copy of Durison's memorandum, although he did not receive it. A. at 44, SA.

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time served). Durison's taking note of such a presumption was appropriate, given that the Philadelphia Sentence, in total, remained within the statutory maximum of 7 years for a third-degree felony: a 2-4 year initial incarceration term and a 1½ to 3 year violation of probation sentence.

at 18, 48. Royal also claims that he sent two additional letters to Durison dated July 28, 2001 and August 27, 2001, reiterating his request for six months of time credit on the Philadelphia Sentence. A. at 40-41, SA. at 46-47. Durison did not receive these letters. SA. at 49.

G. District Court Opinion.

On May 27, 2004, the District Court entered its order and opinion granting Durison's motion for summary judgment. In that opinion, the District Court rejected Royal's Eighth and Fourteenth Amendment claims on the merits. The District Court found that Royal had not shown that any excessive detention was the result of deliberate indifference on Durison's part, because the evidence demonstrated that Durison investigated plaintiff's question and responded within weeks, and re-investigated and notified plaintiff of time credit to which he was entitled when plaintiff made yet another request. Petition App. at 11-16.

Royal filed a motion to alter or amend the judgment on June 7, 2004, which was denied on December 22, 2004. A. at 21. Royal filed a timely notice of appeal on January 4, 2005.

H. Court of Appeals Proceedings.

On April 21, 2005, the Third Circuit Court of Appeals issued an order directing the parties to

address whether *Heck v. Humphrey*, 512 U.S. 477 (1994), barred plaintiff's action. A. at 17. The parties submitted briefs. The Court appointed counsel for Royal on January 19, 2006, and again ordered both parties to brief whether *Heck v. Humphrey* barred Royal's suit.[3]

On November 20, 2007, in a Non-Precedential Opinion, the Third Circuit ruled that Royal's claims were barred by *Heck*. The Third Circuit rejected Royal's claim that his Eighth Amendment rights were violated when he was allegedly "incarcerated for more than six months in excess of the maximum sentence allowed under Pennsylvania law" because the claim attacked his "confinement or its duration," which was barred by *Heck*. Petition App. at 4. The Third Circuit also found that *Heck* precluded Royal's due process claim that Durison had not "meaningfully and expeditiously considered" his allegations of insufficient time credit, because ruling for Royal on that claim would establish that at least part of his violation of probation sentence was invalid. Petition App. at 5. Finally, as for the question that *Heck* should not apply because Royal could no longer file a habeas petition to challenge his incarceration, the Third Circuit noted that the Court had already "expressly

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[3] The parties did not litigate the *Heck* issue in the District Court; rather, the question was litigated at the Third Circuit's request. Interestingly, Royal did not raise any objection to litigation of the *Heck* issues in the Third Circuit, nor does he do so in his petition to this Court.

declined to adopt" such a rule, citing *Williams v. Consovoy*, 453 F.3d 173, 177-78 (3d Cir. 2006). Petition App. at 5-6.

REASONS FOR DENYING THE PETITION

Faced with the bar of *Heck* and his own process of delay, Royal attempts to turn to Circuit Court opinions interpreting the concurring and dissenting opinions in *Spencer v. Kemna*, 523 U.S. 1 (1998), to gain another opportunity to attack his sentence. Petition at 17-22. In support of his arguments, Royal reports that five circuits have endorsed the view point that "the favorable termination rule of *Heck* does not bar § 1983 plaintiffs who cannot pursue habeas corpus." Petition at 17. Unfortunately for Royal, there is *no* Circuit split on the issue that his case actually presents to this Court: no Circuit has allowed a former prisoner to re-litigate his delayed (and failed) attacks on his sentence through a § 1983 action.

A. *Heck* Bars Royal's Delayed Collateral Attack on His Sentence.

First and foremost, this Court should recognize that Royal's § 1983 suit is barred by *Heck* because it is a delayed collateral attack on the sentence imposed on him by the Pennsylvania courts. Royal's argument, in sum, is that he did not receive six months of credit for "time served" that he was due under 42 Pa. Cons. Stat. Ann. § 9760(2), and that, as a result, he served

an illegal sentence of seven years and six months of incarceration, six months more than the seven year statutory maximum for a third-degree felony. Petition at 8-9.

A claim that a defendant did not receive statutorily mandated credit for time served prior to the imposition of a sentence can and should be raised in a direct appeal or in a PCRA petition in the Pennsylvania appellate courts. A defendant can raise a time credit challenge to the initial sentence imposed for an offense, or to a sentence imposed due to a defendant's violation of his probation. *See Commonwealth v. Smith*, 853 A.2d 1020 (Pa. Super. Ct. 2004) (considering a time credit challenge to an initial sentence); *Commonwealth v. Bowser*, 783 A.2d 348 (Pa. Super. Ct. 2001) (evaluating a time credit challenge to a violation of probation sentence).

Furthermore, a trial court's failure to credit a defendant with time served is an error of such magnitude that the challenge is non-waivable: it can be raised with the appellate court on direct appeal in the first instance. *See Commonwealth v. Williams*, 662 A.2d 658, 659 (Pa. Super. Ct. 1995) (considering sentencing credit claim "sua sponte" on appeal from a violation of probation sentence).

Furthermore, the Pennsylvania Supreme Court has held that a prisoner with a time credit claim akin to Royal's *must* challenge that alleged lack of credit through a direct appeal or PCRA petition. In *McCray v. Department of Corrections*, 872 A.2d 1127, 1132 (Pa.

2005), the Pennsylvania Supreme Court held that a defendant who believes that he has not received adequate credit for time served, and therefore has received a violation of probation sentence that exceeds the statutory maximum for his crimes, must bring his challenge through the criminal court process, rather than seek a civil remedy in the first instance.[4] *See id.* at 1132-33 (prisoner should have sought relief before sentencing court for credit for time served, rather than through a civil mandamus action against the Department of Corrections); *see also id.* at 1134-35 (Castille, J., concurring) (any attempt to challenge a failure to credit time served for a violation of probation sentence should be raised through direct criminal appeal or through PCRA petition).

Therefore, what Royal could have done is challenge any alleged failure to receive time credit in 1984, when he first became aware that his sentence was apparently six months longer than it should have been. District Court Judge Robreno so recognized

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[4] Post-*McCray*, a state court mandamus action by an inmate against a prison official for time served can only occur as a means to implement a court order expressly providing for credit for time served. *See, e.g., Black v. Pennsylvania Dep't of Corrections*, 889 A.2d 672, 675-77 (Pa. Commw. Ct. 2005). Royal's citation to *McSpadden v. Department of Corrections*, 870 A.2d 975 (Pa. Commw. Ct. 2005), is therefore inapposite. *See* Petition at 11 n.3; *McSpadden v. Department of Corrections*, 886 A.2d 321, 327-28 (Pa. Commw. Ct. 2005) (noting remand because prior opinion had relied on an interpretation of the law that had been reversed by the Pennsylvania Supreme Court).

when he denied Royal's motion to amend his habeas petition:

> It appears that petitioner may have forfeited any state court opportunity to contest the calculation of credit for a period of time in 1983 and 1984 by not including this claim on a direct or collateral appeal of his 1984 sentenced [sic] in state court. In that instance, the claim would be procedurally defaulted for federal habeas purposes and, as petitioner alleges no cause, prejudice, or miscarriage of justice, consideration of the defaulted claim would be foreclosed in this court.

SA. at 90.

Assuming Royal's claim remained viable over time, Royal also could have challenged the lack of credit once again in 1999, after he received his violation of probation sentence. Instead, Royal made no challenge whatsoever to his sentence in 1984, and he made no argument regarding time credit in his direct appeal from his violation of probation sentence in 1999. In fact, Royal waited until 2000, when he filed his PCRA petition, to raise the issue that he now wants to raise in this § 1983 action against Durison.

The *Heck* bar is particularly apparent where Royal's claims of error as a § 1983 plaintiff mirror his arguments as an aggrieved state court criminal defendant. Royal and his PCRA counsel framed their appellate issue to the Pennsylvania Superior Court as follows:

> Appellant maintains he was not properly credited for time served and in his *pro se* petition declares that he is eligible for relief because he was given a sentence that was greater than the lawful maximum.

SA. at 102 (Superior Court PCRA opinion).

This Superior Court argument reappears (in a number of guises) in Royal's § 1983 action against Durison:

> • Complaint: "Because of [Durison's] inaction to my request the Plaintiff served a sentence beyond the statutory maximum. The Plaintiff is claiming [Durison was] responsible for the Plaintiff having to serve a sentence beyond its term and the statutory maximum." A. at 30;
>
> • July 28, 2001 Letter: "Mr. Durison, my sentence is illegal if I am not given the credit time served." A. at 34, SA. at 43;
>
> • Royal's Deposition: "Hey, I pled guilty to a felony three and the maximum amount of time I could do for a felony three that Judge Maier gave me was seven years[.]" A. at 59;
>
> • Deposition: "[N]ow, when I got to the point of seven years served and I didn't have the commitment credit time, I went beyond the seven years . . . it was mandatory that I have that credit time, according to the statute." A. at 69.

In sum, where Royal had a number of chances to litigate his challenge to his sentence in the state courts and through the vehicle of a federal habeas petition, *Heck* bars his attempt to litigate these questions once again through his § 1983 lawsuit against Durison.

B. The Circuits Are Not "Split" On the Issue Royal's Case Actually Presents.

Royal claims that five circuits have ruled *Heck* does not bar a § 1983 lawsuit if a plaintiff cannot pursue habeas corpus, and that four have ruled that *Heck* does bar such a suit. Petition at 17-25. However, the Circuits are not split on the issue that Royal's case presents: whether a former prisoner can bring a belated collateral attack on a state court's judgment. No Circuit Court has accepted that premise.

In rejecting arguments akin to Royal's, a number of the Circuits have acknowledged both the core holding of *Heck* and the inherent contradiction of allowing a federal tort claim to invalidate a state court criminal conviction or sentence. For example, in *Figueroa v. Rivera*, 147 F.3d 77 (1st Cir. 1998), plaintiffs sought to bring a § 1983 lawsuit on behalf of a relative who had died in prison while a habeas petition was pending; their complaint alleged that their relative had been framed by police officers, "thereby spawning an unconstitutional conviction and sentence." *Id.* at 80. The First Circuit rejected plaintiffs'

argument that their relative's death excepted them from the *Heck* favorable termination requirement because any such exception would run "afoul of *Heck's* core holding: that annulment of the underlying conviction is an element of a section 1983 'unconstitutional conviction' claim." *Id.* at 81.

The First Circuit also reasoned that "[c]reating an equitable exception to this tenet not only would fly in the teeth of *Heck*, but also would contravene the settled rule that a section 1983 claimant bears the burden of proving all the essential elements of her cause of action." *Id.* at 81. As a result, the First Circuit determined that *Heck* barred plaintiffs' unconstitutional conviction and imprisonment claims. *See id.*

Faced with a similar request for an exception in *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005), the Third Circuit took note of the principle set forth in *Heck* that a plaintiff should not succeed in a tort action "after having been convicted in the underlying criminal prosecution, which would run counter to the judicial policy against creating two conflicting resolutions from the same transaction." *See id.* at 209, *citing Heck*, 512 U.S. at 484. The Third Circuit therefore concluded that plaintiff's guilty plea or "ARD" (an alternate disposition of the criminal charges) barred his § 1983 claims, lest there be a conflicting state court and federal court judgment on the same set of facts. *See id.* at 210-12; *see also Williams v. Consovoy*, 453 F.3d 173, 177 (3d Cir. 2006) ("In *Gilles* we concluded that *Heck*'s favorable-termination

requirement has not been undermined"); *see also Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007), *cert. denied*, 2008 U.S. Lexis 2873 (Mar. 24, 2008) (concluding that *Heck* rule remained intact, and it would not create a new opportunity for a collateral attack by a former prisoner).

Furthermore, the Circuits have not been willing to create an exception to *Heck* where a plaintiff (like Royal) had other opportunities to challenge a conviction or sentence and failed to use them. For example, in *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000), the Fifth Circuit rejected an argument by a plaintiff that because he had been released from custody and could not file a habeas corpus petition, he should be allowed to bring a § 1983 damages action to challenge a failure to receive credit for time served. *See id.* at 300-01. The Fifth Circuit recognized that plaintiff's § 1983 claim would challenge his underlying conviction, and that it was therefore barred by *Heck*'s favorable termination requirement. *Id.* at 301. The Court then rejected plaintiff's "[I] can no longer seek habeas relief" rationale on the basis that a plaintiff who wished to claim that *Heck*'s requirement of favorable termination had been relaxed in some manner would have to demonstrate that he had "no procedural vehicle to challenge [his] conviction" and that plaintiff had "not shown that such a procedural vehicle is lacking; he speaks only of inability to obtain habeas relief." *Id.* at 301.

Although the Seventh Circuit has stated that there is "*probably* an exception to the rule of *Heck* for

cases in which no route other than a damages action under section 1983 is open to the person to challenge his conviction[,]" it has also made plain that where a plaintiff has the option of pursuing a direct appeal or some form of collateral attack in the state courts, his case is barred by *Heck*. *See Hoard v. Reddy*, 175 F.3d 531, 533 (7th Cir. 1999) (emphasis added); *Nance v. Vieregge*, 147 F.3d 589, 591 (7th Cir. 1998) (where plaintiff had option of seeking a pardon from the governor or a writ of coram nobis, he could not claim an exception from *Heck*'s favorable termination requirement); *cf. Carr v. Leary*, 167 F.3d 1124, 1127-28 (7th Cir. 1999) (plaintiff who lacks option of direct appeal or postconviction proceeding may be able to proceed with a § 1983 lawsuit in federal court, but declining to reach the issue, as defendants had waived any *Heck* defense).

The Sixth Circuit used a similar line of reasoning in *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592 (6th Cir. 2007). In determining whether there might be a *Heck* "exception" for plaintiffs who could not file a habeas petition, the Sixth Circuit determined that a plaintiff would not be "entitled to such an exception if the plaintiff could have sought and obtained habeas review while still in prison but failed to do so." *See id.* at 601. Further, the Ninth Circuit, in *Guerrero v. Gates*, 442 F.3d 697 (9th Cir. 2006), also held that a plaintiff who had access to habeas, yet did not resort to it, could not "now use his 'failure timely to pursue habeas remedies' as a shield

against the implications of *Heck*." *Id.* at 705 (citations omitted).

Moreover, other cases on which Royal relies extend an exception to *Heck* within the context of purely administrative determinations, rather than a challenge to a court order such as a conviction or judgment of sentence. *See Nonette v. Small*, 316 F.3d 872, 878 n.7 (9th Cir. 2002) ("We also emphasize that our holding affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters; the status of prisoners challenging their underlying convictions or sentences does not change upon release, because they continue to be able to petition for a writ of habeas corpus"), *citing Spencer*, 523 U.S. at 7-12; *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001) (reasoning that plaintiff's challenge could proceed in part because it was addressing an administrative decision directed to the "duration of [her son's] confinement" rather than a challenge to a judicial pronouncement, such as the underlying conviction).

In fact, some of the opinions on which Royal relies do not address claims that would be barred by *Heck* in the first place. *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000), involved a prisoner challenging the conditions of his confinement, rather than the length or duration of that confinement. *See id.* at 613. This Court has already ruled that such claims are cognizable under § 1983. *Muhammad v. Close*, 540 U.S. 749, 754-55 (2004) (prison disciplinary sanctions that

do not lengthen an inmate's sentence are not barred by *Heck*).

In *Harden v. Pataki*, 320 F.3d 1289 (11th Cir. 2003), the Eleventh Circuit addressed a challenge to the procedures used in plaintiff's criminal case, rather than the actual result: this type of § 1983 claim has been cognizable both pre- and post-*Heck*.[5] *See id.* at 1290; *see also Wilkinson v. Dotson*, 544 U.S. 74, 82-84 (2005); *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592, 603-04 (6th Cir. 2007) (plaintiff's § 1983 claim was a procedural challenge to Public Defender's practices, and therefore not barred by *Heck*).

Royal's claim of a "five to four" Circuit split does not reflect Circuit authority or the overt respect for state court judgments shown in those opinions. There is no Circuit that has held that a former prisoner who had an opportunity to challenge his sentence in a habeas proceeding but failed to do so can later challenge that sentence in a § 1983 suit once habeas becomes unavailable, and there are four Circuits that have indicated that such a claim does

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[5] Even judges in the Eleventh Circuit have recognized that *Harden* may not have the sweep that Royal wants it to have. In *Abusaid v. Hillsborough County Bd. of County Commissioners*, 405 F.3d 1298, 1315 n.9 (11th Cir. 2005), Eleventh Circuit Judge Marcus stated in dicta that while he would be amenable to creating an exception to *Heck* for plaintiffs for whom habeas is not available, "[o]ur Court has not yet weighed in" on the issue that Royal now wishes to present to this Court.

not lie. Therefore, this Court should deny Royal's petition for certiorari.

C. Royal's Prior State Court Cases and Habeas Petition Preclude His § 1983 Lawsuit Against Durison.

This Court should also deny Royal's petition for certiorari because his § 1983 lawsuit is barred by the doctrine of issue preclusion. Royal litigated the term and length of his sentence on direct appeal to Superior Court, and he lost that challenge. SA. at 80-81. He cannot mount yet another challenge to the legality and length of his violation of probation sentence in the form of a § 1983 action against Durison.

The preclusive effect of Royal's prior state court challenge to his sentence provides another reason for this Court to deny certiorari, because, regardless whether a Circuit accepts or rejects the existence of any *Heck* "exception" under *Spencer v. Kemna*, those same Circuits do accept the applicability of the doctrines of claim and issue preclusion to a former prisoner's § 1983 suit. *See Huang v. Johnson*, 251 F.3d 65, 74-75 (2d Cir. 2001) (if claim and issue preclusion apply to a § 1983 suit, that suit cannot proceed); *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (same); *Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993) (stating that if plaintiff's "conviction were proper, this suit would in all likelihood be barred by res judicata"), *aff'd on other grounds*, *Heck v. Humphrey*, 512 U.S. 477 (1994); *see also Jones v.*

Moore, 996 F.2d 943, 945 (8th Cir. 1993) (prior state court action precluded prisoner's § 1983 claims, and "neither the employment of different, previously unadvanced theories of liability nor requests for previously unsought relief arising from [the same] facts will allow [plaintiff] to avoid the bar imposed by his state court action").

This line of Circuit Court case law is in keeping with this Court's dictates. This Court has made plain that a prior state court judgment, such as a criminal judgment or sentence, can have either issue preclusive or claim preclusive effect on a later § 1983 suit.

Indeed, this Court has so held in the face of an argument remarkably similar to Royal's. In *Allen v. McCurry*, 449 U.S. 90 (1980), plaintiff had unsuccessfully raised Fourth and Fourteenth Amendment arguments regarding the suppression of evidence in his criminal case and on direct appeal. *See id.* at 91. Because he was unable to bring a habeas petition to attack these Fourth Amendment rulings under this Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), plaintiff claimed he was denied a "full and fair opportunity" to litigate his search and seizure claim, and sought to bring a § 1983 suit against the officers who had entered his home and seized evidence. *See Allen*, 449 U.S. at 91. The Eighth Circuit Court of Appeals concluded that because plaintiff was unable to bring a habeas petition under *Stone v. Powell*, a § 1983 suit was plaintiff's "only route to a federal forum for his constitutional claim" so collateral estoppel did not apply. *See* 449 U.S. at 93.

This Court granted certiorari to consider whether the plaintiff's lack of access to habeas corpus barred defendants from raising a collateral estoppel defense to plaintiff's § 1983 suit against them for damages. *See* 449 U.S. at 91. This Court ruled that the Eighth Circuit erred in holding that the plaintiff's inability to obtain federal habeas corpus relief meant that collateral estoppel did not apply to his § 1983 action:

> The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself.

Id. at 103.

In so deciding, this Court took note of both the effect of 28 U.S.C. § 1738, in which Congress "specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments entered would do so[,]" as well as the history and text of § 1983. *See id.* at 96, 97-98. In particular, this Court found that "nothing in the language of § 1983 remotely expresses any congressional intent to contravene the

common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738," and that the legislative history did not suggest that Congress "intended to repeal or restrict the traditional doctrines of preclusion." *Id.* at 97-98.

This Court returned to the question of the preclusive effect of state court judgments in *Migra v. Warren City School District Bd. of Ed.*, 465 U.S. 75 (1984). In *Migra*, plaintiff did not litigate her § 1983 claim in state court, but had litigated other state law claims pertaining to the same facts; she argued that state court judgments should only have preclusive effect as to issues actually litigated in state court. *See id.* at 83. This Court once again affirmed the principle that "Section 1983 . . . does not override state preclusion law" and that § 1983 did not "guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims." *Id.* at 85. This Court held that the state court judgment should be given claim preclusive effect in federal court. *See id.* at 86.

In Pennsylvania, a criminal judgment against a defendant has a collateral estoppel effect on a later civil proceeding. *See Shaffer v. Smith*, 673 A.2d 872, 874-75 (Pa. 1996) (criminal conviction had collateral estoppel effect on facts and conduct in a subsequent civil trial); *Burger King v. WCAB (Boyd)*, 579 A.2d 1013 (Pa. Commw. Ct. 1990) (rule of conclusive effect of prior convictions extends to proceedings before an

administrative agency). That is, if that defendant's lawsuit can be filed at all. *See Wilson v. Marrow*, 917 A.2d 357, 362-63 (Pa. Commw. Ct. 2007) (plaintiff could not bring § 1983 lawsuit against Parole Board employees where he had already challenged the Parole Board's action in a revocation action and habeas proceeding). The Superior Court's decision affirming Royal's sentence would have preclusive effect in civil proceedings in the Pennsylvania state courts. It should have the same preclusive effect on Royal's § 1983 action. *See Allen*, 449 U.S. at 103-04.

Royal's § 1983 lawsuit is also barred as a matter of federal common law. Royal litigated the term and length of his sentence in his District Court habeas proceeding as well, and he made constitutional challenges to that sentence in the process. SA. at 80-81, 88-90. The District Court denied his petition on the merits. SA. at 80-81, 88-90. Where the fact and length of Royal's sentence were front and center in his habeas petition, and determined on the merits by a District Court, he cannot bring a § 1983 proceeding against Durison to argue once again that the fact and length of his sentence were wrong, and his sentence really should have been six months shorter than it was. *See, e.g., Hawkins v. Risley*, 984 F.2d 321, 323-24 (9th Cir. 1993) (prior habeas proceeding precluded § 1983 claims on same set of facts against individual defendants from Board of Pardons and prison system); *Warren v. McCall*, 709 F.2d 1183, 1183-85 (7th Cir. 1983) (prior habeas proceeding

precluded subsequent § 1983 suit against parole commission and prison officials).

Therefore, this Court's opinions in *Allen* and *Migra*, as well as Circuit court case law on issue preclusion direct that Royal's petition be denied.

D. If Royal's § 1983 Claims Can Be Separated From His Sentence, Those Claims Are Time-Barred Or Simply Lack Merit.

Royal's case also does not warrant certiorari review because even if his claims were separable from his sentence, he did not file those claims within the applicable statute of limitations. Recently, in *Wallace v. Kato*, 127 S. Ct. 1091 (2007), this Court made plain that the *Heck* deferred accrual rule only applies to § 1983 actions that would impugn an existing criminal judgment; in such cases, the statute of limitations begins to run when (and if) an extant conviction is set aside. *See id.* at 1097-98. Otherwise, the standard rule is that the statute of limitations for a § 1983 lawsuit begins to accrue at the time when "'the plaintiff can file suit and obtain relief.'" *Id.* at 1095, *quoting Bay Area Dry Cleaning & Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997); *see also United States v. Kubrick*, 444 U.S. 111, 122-24 (1979) (FTCA two-year statute of limitations begins to accrue when plaintiff knows of existence and cause of injury).

Section 1983 claims are governed by the relevant state's personal injury statute of limitations; Pennsylvania's statute of limitations for such actions is two years. *See Wilson v. Garcia*, 471 U.S. 261, 276 (1985); 42 Pa. Cons. Stat. Ann. § 5524(2). Royal admitted in his deposition that in 1984 he became aware that he had not received presentence time credit. SA. at 25. This was sufficient notice for him to begin investigating any potential § 1983 claims, and his complaint therefore should have been filed by 1986. SA. at 25. Instead, he did not file his complaint until July of 2003. A. at 18.

Royal cannot rescind the time bar on his claims by arguing that they did not begin to accrue until after he began to serve "excess" time on his seven year sentence. This Court stated in *Wallace v. Kato* that a "cause of action accrues even though the full extent of the injury is not then known or predictable. . . . Were it otherwise, the statute would begin to run only after a plaintiff became satisfied that he had been harmed enough, placing the supposed statute of repose in the sole hands of the party seeking relief." 127 S. Ct. at 1097.

In a similar vein, this Court has held that a statute of limitations begins to run on the date that a plaintiff receives notice of a denial of a request, not on the date that the denial goes into effect. For example, in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), this Court held that the statute of limitations for a plaintiff's § 1981 suit alleging a wrongful denial of tenure occurred on the date when he became aware

that he had been denied tenure, even though "one of the *effects* of the denial of tenure – the eventual loss of a teaching position – did not occur until later." *See id.* at 258 (emphasis in original). Moreover, the statute of limitations began to run on the date the plaintiff knew of the denial, even though he had asked the employer to review and reconsider the decision: what mattered for purposes of the accrual of any statutory claim under § 1981 was the date he was on notice of the employer's decision. *See id.* at 261-62.

At the latest, the statute of limitations for Royal's § 1983 suit began to run when Royal received Durison's November 15, 1999 letter stating that he would not grant his request for time credit. Under this scenario, the statute of limitations for any § 1983 claims against Durison ran in late 2001, yet Royal still waited to file his complaint until 2003, long after the statute of limitations expired. Royal may have asked Durison to reconsider the decision after 1999, but those additional requests did not toll the statute of limitations, particularly given that he was aware of any time credit "problem" as of 1984. *See id.* at 261-62.

Royal also tries to convince this Court that his Eighth and Fourteenth Amendment claims have enough merit to convince this Court to ignore the *Heck* bar, let alone the other procedural bars to his suit. Petition at 28-29. In *Sample v. Diecks*, 885 F.2d 1099, 1109-11 (3d Cir. 1989), and *Moore v. Tartler*, 986 F.2d 682, 686 (3d Cir. 1993), the Third Circuit recognized that a decision not to investigate a sentence

request, or a failure to make a record of a request or refer an inmate to another official who could resolve that request might constitute deliberate indifference. However, the Third Circuit also recognized that a slow or mistaken investigation would not demonstrate deliberate indifference. *See Moore*, 986 F.2d at 686 (mistaken investigation that took five months to complete did not constitute deliberate indifference). Here, Durison personally investigated plaintiff's claim, determined that his custody records for 1983 and 1984 had been destroyed, and concluded that, regardless of the unavailability of the records, plaintiff was not entitled to the credit from 1983 and 1984 that he sought. A. at 22-23, SA. at 48. Durison explained this to plaintiff within weeks of receiving plaintiff's October 1999 request, and recommended that he get in touch with an official in the state prison system who might be better able to help him. A. at 22-23 (Durison's November Letter). When Durison received another request from Royal, he determined that Royal appeared to be entitled to three days of credit on his 1999 incarceration, and recommended that those three days of credit be applied toward his total incarceration term by the state prisons. A. at 44-45.

At base, plaintiff was and is dissatisfied with the outcome of Durison's investigation. However, that dissatisfaction does not translate into deliberate indifference on Durison's part. Nor does it translate into a case worthy of a grant of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 07-1056

IN THE
Supreme Court of the United States

HOZAY ROYAL,

Petitioner,

v.

ROBERT DURISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent does not dispute that the courts of appeals are deeply divided over the question of whether *Heck* v. *Humphrey*, 512 U.S. 477 (1994), bars a Section 1983 action brought by a plaintiff to whom habeas corpus is no longer available. Instead, Respondent acknowledges (Op. 20-22, 25-26) that four circuits have held Section 1983 is *not* available to such a plaintiff, and points to inapplicable or irrelevant factors in an ineffectual effort to distinguish the five circuits that have held Section 1983 *is* available (Op. 22-25). Respondent also admits that the court of appeals' sole reason for affirming the dismissal of Petitioner's action was that it was barred by *Heck* v. *Humphrey*. Op. 14.

The bulk of the Brief in Opposition is devoted to an attack on the timing and merits of Petitioner's Section 1983 claim, neither of which the court of appeals discussed or ruled upon. Respondent's arguments that Petitioner should have brought his claim at a different time or in a different forum are incorrect, as are his arguments on the merits. But in any case they do not provide a basis for denying the Petition because the court of appeals relied solely on the *Heck* bar and did not reach the merits of the case.

1. As shown in the Petition, five circuits have held that *Heck*'s favorable termination requirement does not apply to a Section 1983 suit brought by a former prisoner who has no recourse to habeas corpus. Pet. 17-22. These courts' decisions are in accord with Justice Souter's concurring opinion in *Heck* and the concurring and dissenting opinions of

five Justices in *Spencer* v. *Kemna*. *Heck*, 512 U.S. at 500 (Souter, J., concurring); *Spencer*, 523 U.S. 1, 19 (1998) (Souter, J., concurring); *id.* at 21 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting).

Without discussing *Heck*'s concurrence or the opinions in *Spencer* that the decisions of five circuits rely upon, Respondent points to irrelevant matters and non sequiturs in an ineffectual attempt to distinguish those decisions.

First, Respondent tries to distinguish the Sixth and Seventh Circuits' decisions by assuming away the question presented. Op. 22-23. Respondent contends that those courts would not allow a Section 1983 case brought by a former prisoner to go forward if the plaintiff "has the option of pursuing a direct appeal or some form of collateral attack in the state courts," or "'could have sought and obtained habeas review while still in prison but failed to do so.'" Op. 23 (quoting *Powers* v. *Hamilton County Public Defender Comm'n*, 501 F.3d 592, 601 (6th Cir. 2007)). But the question here is whether a Section 1983 case can go forward despite *Heck* precisely because plaintiff does *not* have access to habeas corpus or other collateral review. *See DeWalt* v. *Carter*, 224 F.3d 607, 617 (7th Cir. 2000) (*Spencer* reveals that five Justices hold the view that Section 1983 "must be available to challenge constitutional wrongs where habeas is not available."). Here, while Petitioner sought postconviction relief in both state court and in his federal habeas corpus petition, he was unable to obtain relief because he was released and his claim became moot. *See* Pet. 12.

Respondent next asserts that cases from the Second and Ninth Circuits were decided "within the

context of purely administrative determinations, rather than a challenge to a court order such as a conviction or judgment of sentence." Op. 24. But both of the cases that Respondent cites presented exactly the same type of claim that Petitioner asserts here. In *Nonnette* v. *Small*, a former prisoner challenged the calculation of his sentence and the revocation of good time credits. 316 F.3d 872, 874 (9th Cir. 2002). Likewise, the Second Circuit in *Huang* v. *Johnson* allowed a Section 1983 suit challenging the application of credit for time served to go forward though it was "aimed at the duration" of the confinement because "no habeas remedy" was available. 251 F.3d 65, 75 (2d Cir. 2001). Like the plaintiffs in *Nonnette* and *Huang*, Petitioner does not challenge "a conviction or judgment of sentence." Op. 24. Petitioner challenges Respondent's failure to properly credit him with time previously served as required under Pennsylvania law.

Respondent's attempt to distinguish the Eleventh Circuit on the basis that the claim at issue would not "be barred by *Heck* in the first place" (Op. 24-25) is similarly unpersuasive. In *Harden* v. *Pataki*, the Eleventh Circuit reversed a district court's ruling that a Section 1983 case was barred by *Heck*, holding that "because federal habeas corpus [was] not available" to the plaintiff, "§ 1983 must be." 320 F.3d 1289, 1299 (11th Cir. 2003).

On the other side of the circuit split, Respondent agrees that four circuits, the First, Third, Fifth, and Eighth, have held that "a claim does not lie" under Section 1983 where habeas corpus is not available. Op. 20-22; 25-26. Unlike the Second, Sixth, Seventh, Ninth, and Eleventh

Circuits, these courts have expressly declined to follow the view expressed in concurring and dissenting opinions in *Spencer* and the decisions of the courts on the majority side of the split. *E.g.*, *Entzi* v. *Redmann*, 485 F. 3d 998, 1003 (8th Cir. 2007) (declining to follow the *Spencer* opinions and noting contrary Sixth and Ninth Circuit authority); *Williams* v. *Consovoy*, 453 F.3d 173, 177 (3d Cir. 2006) ("We decline to adopt [the Second Circuit's decision in] *Huang* here."); *Randell* v. *Johnson*, 227 F.3d 300, 301 & n.4 (5th Cir. 2000) (per curiam) (declining to follow the *Spencer* opinions and noting that three circuits have held otherwise); *Figueroa* v. *Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998) (declining to follow the *Spencer* opinions).

In addition, other courts and scholars have acknowledged the circuit split presented by the Petition. *E.g.*, *Powers*, 501 F.3d at 602 ("[O]ur sister circuits are divided on the question."); *Dible* v. *Scholl*, 410 F. Supp. 2d 807, 820 (N.D. Iowa 2006) (noting that the courts have "split into two camps"); Note: *Defining the Reach of* Heck *v.* Humphrey*: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?* 121 Harv. L. Rev. 868, 869 (2008) ("the lower courts are divided" on the question); Bruce Ellis Fein, Heck *v.* Humphrey *After* Spencer *v.* Kemna, 28 New Eng. J. on Crim. & Civ. Confinement 1, 25 (2002) (noting the circuit split on "an important question[] of federal law" that "demand[s] resolution").

The courts and scholars that have recognized the circuit split are correct. The question is an important one, squarely presented here, that is ripe for this Court's resolution.

2. Respondent's contentions that Petitioner should have brought his claim in a different forum or at a different time are incorrect, as are his claims on the merits.

The Brief in Opposition fundamentally misconstrues Petitioner's Section 1983 claim by contending that he should have brought it earlier or in a different forum. Simply stated, Petitioner's claim is that under Pennsylvania law, he was entitled to credit against his 1999 probation revocation sentence for six months that he spent in custody before his initial sentence for the same charge, where that time was not credited against the initial sentence. *See* 42 Pa. Cons. Stat. § 9760. Despite six separate requests, Respondent failed to investigate Petitioner's right to that credit. As a result, Petitioner served a total of seven and one half years on a crime that carries a maximum sentence of seven years. The proper time and forum to bring this claim was in the federal district court, within the limitations period after Petitioner was subjected to illegal imprisonment.

Respondent improperly focuses on whether Petitioner raised the time credit issue with regard to his first sentence in 1984. But regardless of whether Petitioner could have obtained credit against that sentence through appeal or postconviction relief, Pennsylvania law requires that on a probation violation sentence, a defendant is entitled to credit against the maximum sentence for "all time spent in custody" as a result of the offense. 42 Pa. Cons. Stat. § 9760; *see also McSpadden* v. *Dep't of Corr.*, 870 A.2d 975, 977 (Pa. Commw. Ct. 2005); *Commonwealth* v. *Bowser*, 783 A.2d 348, 350 (Pa.

Super. Ct. 2001); *Commonwealth* v. *Williams*, 662 A.2d 658, 659 (Pa. Super. Ct. 1995). Accordingly, Petitioner was entitled to credit for all of the time that he was held regardless of whether he challenged the failure to credit that time to his initial sentence.

Nor is this a collateral attack on Petitioner's conviction or sentence. Petitioner does not contend that he was improperly convicted, and does not contend that his sentence was not lawfully imposed. Petitioner challenges only Respondent's failure to properly calculate the credit Petitioner was due against that sentence. Moreover, Respondent's suggestion (Op. 15-16) that Petitioner did not pursue his claim through available state postconviction relief or federal habeas is plainly wrong. Petitioner brought this claim in a petition under Pennsylvania's Post-Conviction Relief Act, and attempted to amend his habeas corpus petition to include the issue. *See* Pet. 12; Pet. App. 9a. These claims were not denied on their merits; Petitioner's state petition was denied as moot after he was released, and his attempt to add the issue to his habeas petition was denied as defaulted or not yet exhausted. Pet. App. 10a.

a. Petitioner's claim is not barred by issue preclusion, "federal common law," or by the statute of limitations.

Issue preclusion, which Respondent raises for the first time in the Brief in Opposition, plainly does not apply here. In Pennsylvania, issue preclusion applies if five criteria are met: "'(1) when the issue in the prior adjudication was *identical* to the one presented in the later action; (2) when there was a *final judgment* on the merits; (3) when the party against whom the plea is asserted was a party or in

privity with a party to the prior adjudication; (4) when the party against whom it is asserted has had a *full and fair opportunity to litigate the issue* in a prior action; and (5) when the determination in the prior proceeding was *essential to the judgment.*'" *Cohen* v. *Workers' Comp. Appeal Bd.*, 909 A.2d 1261, 1264 (Pa. 2006) (emphasis added).

Respondent contends that "Royal litigated the term and length of his sentence on direct appeal to the Superior Court," (Op. 26), but Petitioner's entitlement to credit for his 1983-84 periods of incarceration was not at issue in that appeal. Indeed, Petitioner's requests that Respondent properly calculate his credit were pending at the same time as his direct appeal. Accordingly at least two requirements for issue preclusion are not met because the issue in Petitioner's appeal was neither "identical" to the issue here nor "essential to the judgment."

Respondent's claim (also raised for the first time in the Brief in Opposition) that this action is "barred as a matter of federal common law" (Op. 30) is likewise flawed. Respondent claims that "Royal litigated the term and length of his sentence in his District Court habeas proceeding," but the district court did not rule on the merits of the time credit issue Petitioner asserts in this action. Rather, the court denied Petitioner's motion to amend the petition to add the issue on the grounds that the issue was not yet exhausted or procedurally defaulted. C.A. Supp. App. SA90-91 n.2.

Nor is Petitioner's claim barred by the statute of limitations. Respondent claims that the statute began to run on Petitioner's claim—that he was

illegally imprisoned beyond his lawful sentence in 2001-02—in 1984, when Petitioner first learned he was not properly credited with time served, or in 1999, when Respondent indicated that he did not have records from which to calculate Petitioner's time credit. Op. 33. But "'[u]nder the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission *results in damages*.'" *Wallace* v. *Kato*, 127 S. Ct. 1091, 1097 (2007) (quoting 1 C. Corman, Limitation of Actions § 7.4.1, at 526-27 (1991)) (emphasis added). Here, Petitioner's claim to time credit did not result in damages until he remained in prison beyond the time when his properly calculated sentence ended. Before then, Petitioner's claim to damages would have been speculative. Petitioner filed his complaint in this case within the statutory period following the first day that he was illegally imprisoned.[1]

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[1] The limitations period for a § 1983 action is based on the state's personal injury statute of limitations. *Wilson* v. *Garcia*, 471 U.S. 261, 276 (1985). In Pennsylvania, personal injury suits are subject to a two-year statute of limitations. 42 Pa. Cons. Stat. § 5524(2). Petitioner was released on February 16, 2002. Had Petitioner received proper time credit, he would have been released 180 days earlier, August 20, 2001. Petitioner's injury thus accrued the next day, August 21, 2001. Petitioner submitted his complaint and application to proceed *in forma pauperis* on July 31, 2003, and it was filed on Aug. 8, 2003, both within the two year statute of limitations period commencing August 21, 2001. C.A. App. 18a, 26a.

b. Respondent's arguments on the merits are incorrect and do not provide a basis for denying certiorari.

The Brief in Opposition (at 10) misstates the record regarding Respondent's purported investigation of Petitioner's claim for time credit from 1983 and 1984. Contrary to Respondent's suggestion, Respondent did not come to any conclusion regarding whether Petitioner was entitled to credit in 1999 for his uncredited detention in 1983 and 1984. His 1999 response to Petitioner's request for credit stated simply, "I have no microfilm or automated records for the period you are referring to, and the court database is no help."[2] C.A. App. 47a-48a. Respondent's assertion that there are four sentences to which "Royal's claimed six months of time served could have been applied" in 1984 (Op. 10) is contained in an affidavit he submitted during this litigation, five years after Petitioner's requests for time credit. C.A. S. App. SA48-50. It is evident from the affidavit—which relies in part on

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[2] Respondent also stated (incorrectly) that because Petitioner was serving a probation violation sentence, he would not be entitled to credit for time served prior to his original sentence. C.A. App. 47a-48a. Respondent now argues that he was applying a presumption (stated in a case decided six years later) that a period of incarceration includes all credit to which the prisoner was entitled, Op. 11 & n.2; however, even if such a presumption were applicable, it applies only "'unless the record shows otherwise.'" *Aviles* v. *Pa. Dep't of Corr.*, 875 A.2d 1209, 1213-14 (Pa. Commw. Ct. 2005) (quoting *United States* v. *Kendis*, 883 F.2d 209 (3d Cir. 1989)). Here, "the record shows otherwise" because Petitioner submitted his "Sentence Status Summary" that showed he received *no* credit against his initial sentence for time served. C.A. App. 35a.

Petitioner's deposition testimony—that these speculations were made during this litigation, *not* contemporaneously with Petitioner's requests. *See id.* ¶ 9. Indeed, even in the affidavit Respondent does not conclude Petitioner was not entitled to credit, admitting that "[t]he above possibilities are conjecture on my part."[3] *Id.* at SA49, ¶ 13.

Respondent's contention that Petitioner's suit is without merit does not provide a basis for denying certiorari. As shown in the Petition, Petitioner has substantial arguments that the district court was incorrect to grant summary judgment in this case. Pet. 28-29. The court of appeals did not reach those arguments because it held that the action was barred by *Heck* v. *Humphrey*. Five circuits, however, would have held that the action was *not* barred by *Heck*. Accordingly, this case presents an ideal vehicle in which to decide whether a Section 1983 plaintiff who has no recourse to habeas corpus must nevertheless satisfy *Heck*'s favorable termination requirement.

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[3] Because this case arises on appeal from a grant of summary judgment to Respondent, the standard is whether there is no question of material fact and the movant is entitled to judgment as a matter of law. Thus, it would be improper to hold that what "could have" happened supports the summary judgment ruling.

CONCLUSION

The petition for a writ of certiorari should be granted.

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